Supreme Court, U.S.
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No. 93-163

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

THE CITY OF DEL MAR,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a land use "merger" regulation, pursuant to a State's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the existence and value of single family home site lots legally created by subdivisions under California Subdivision Regulations?

2. Does the R 1-40 (i.e., net acre), zoning placed on the (20) Snakewall lots on June 23, 1975 by Ordinance No. 246 (Appendix L 18-32), and Open Space and Bluff, Slope and Canyon Overlay Zones placed on the (20) Snakewall lots on December 4, 1975 by Ordinance No. 1-250 [as visually depicted on the City Zoning Map (Appendix at V-1)], when no Property Development Standards exist for R 1-40 zoned lots which are non-conforming because they are less than 40,000 square feet (Appendix at V-2), amount to "spot zoning" and require compensation under the Constitution's Fifth Amendment?

3. Was (1) vote proper on May 7, 1985 (Appendix at S 1-3), in light of the "merger" release on October 7, 1985 (Appendix at L 15-17); and the 1985 City Indemnity Agreement (Appendix at L 34-37); and the July 15, 1986 "legal lots letter" (Appendix at P 1-2); and the City Attorney's September 16, 1982 letter stating "cannot release 'merger' " (Appendix at T-1); and the City Attorney August 10, 1982 letter stating the "City has no present intention of acquiring La Atalaya" (Appendix at U-1)?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, James E. Smith, an individual, and the Respondent, the City of Del Mar, incorporated in April, 1961 as a California City with a present population of approximately 5,000 people.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner James E. Smith respectfully prays that a writ of certiorari issue to review the February 22, 1993, opinion of the Court of Appeal, Fourth Appellate District, Division One in the above-captioned proceeding; or summarily reverse or summarily vacate the opinion with appropriate instructions in light of this court's recent holding in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___ [112 S. Ct. 2886] (1992).

OPINIONS BELOW

The California Supreme Court on May 12, 1993 denied the Petition for Review which was not reported and is reprinted in the Appendix hereto at Appendix page A-1.[1]

The Opinion of the Court of Appeal, Fourth Appellate District, Division One, dated February 22, 1993, was not reported, and is reprinted at App. E-1-27.

The judgment after court trial of the Superior Court of San Diego County, dated November 13, 1989, was not reported, and is reprinted at App. I-1-5.

The Statement of Decision of the Superior Court of San Diego County, dated August 15, 1989, and amendment thereto, dated October 27, 1989, was not reported, and is reprinted at App. K-1-14 and J-1-2.

STATEMENT OF JURISDICTION

Petitioner seeks review of the February 22, 1993, opinion of the Court of Appeal, Fourth Appellate District, Division One. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

[1] Hereinafter "App. at A . . . Y and p #".

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment[2] of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The California legislature in 1976 enacted effective January 1, 1977 **new** Government Code (i.e. Subdivision Map Act), § 66424.2 which was interpreted by the City of Del Mar as permitting Del Mar to merge into one parcel prior lawfully created subdivision lots that were contiguous and commonly owned, if any one lot did not conform to existing zoning as to minimum lot size.[3] Section 66424.2 was amended on July 7, 1977; and July, 1980; and subsequent amendment by Chapter 1217, 1980; and repealed in 1983 by enactment of new section 66451.10, et seq.; and in 1983 Section 4 Chapter 845 by operation of

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[2] Applicable to California by the Fourteenth Amendment; "nor shall any State deprive any person of life, liberty or property, without due process of law" at § 1.

[3] See App. at E-2; and See App. at Q-1-4 the City of Del Mar memorandum dated October 7, 1985 which states: "The City Council merged the Snakewall Property based on a staff recommendation that some of the lots," [i.e. (13) of the (20) lots, infra], "did not meet the 40,000 square foot size and the minimum width and depth requirements imposed by the R-1-40 overlay zone" (App. at Q-2); and See the City Attorney letters of September 16, 1982 and August 10, 1982 (App. at T-1-3 and U-1-3); and See the May 5, 1985 minutes of the Del Mar Civic Association (App. at S-1-3); and See the San Diego Board of Supervisors' Resolution Map adopted on January 11, 1957 which depicts the (20) Snakewall lots zoned R-1 (App. at W-1); and See the City of Del Mar Zoning Map which depicts the (20) Snakewall lots "Island Spot Zoning" (App. at V-1).

law, unmerged and reestablished any previously merged lots such as the (20) Snakewall lots pursuant to recorded subdivision Map Nos. 1285, 1343 and 1592 recorded in the years 1910, 1911 and 1913. (See App. at R-1-6).

The City of Del Mar Ordinance No. 246 enacted on June 23, 1975 and Ordinance No. 1-250 enacted on December 4, 1975 spot zoned[4] the (20) Snakewall lots from R-1 to R-1-40 with Open Space Overlay and Bluff, Slope Canyon Overlay creating "an island with this spot zoning in a sea of otherwise zoned lots" (App. at V-1 and W-1).

The 1979 California Attorney General Opinion at 62 Ops. Cal. Atty. Gen. 281 analyzed § 66424.2 effective January 1, 1977 and as amended on July 7, 1977 and concluded lawfully subdivided lots did not merge on either January 1, 1977 or July 7, 1977 (App. at B-9-11 and Fn[5], infra).

California Executive Order D-78-89 was signed on December 20, 1989 by then Governor George Deukmejian[5] after this Court's decisions in *Nollan v. California Coastal Commission*, 482 U.S. 825 (1987) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) which are therein referenced.

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[4] App. at E-20-26 and L-18-32. The Snakewall (13) lots which are less than one acre in size are adjacent to existing R-1-10 homes on the north, south and west; and east are Snakewall lots which are more than one acre in size, which are adjacent on their east to government owned "Open Space" park land (App. V-1 and W-1).

[5] In 1979 California Attorney General Deukmejian authored the Opinion at 62 Ops. Cal. Atty. Gen. 281, supra.

Petitioner's letter to the Governor's Office was responded to and enclosed Exec. Order D-78-89 (App. at H-1-5. California's Exec. Order D-78-89 followed Executive Order No. 12,630, 3 C.F.R. 555 (1989) (directing the Attorney General to assist federal agencies to minimize the extent to which their regulatory activities result in a taking of property rights).

STATEMENT OF OTHER LITIGATION PENDING

A Second Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One is due September 7, 1993 concerning only lots H, I and J Map No. 1285 and lot U, Map No. 1343 (i.e., (4) lots Petitioner sold in 1988 and 1989 for $2,458,000.00), Calif. Case S033083/D015814, which will further illustrate the effect of the "spot zoning", supra, Fn[3 and 4].

In addition, a Petition for Review to the Supreme Court of California in Case No. S033948/D017058 was filed on July 16, 1993 concerning lots H, I and J, Map No. 1285 (i.e., Rescission Judgment of Record against Petitioner as Seller in the amount of approximately $1,400,000.00), and potentially could result in a Third Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One which would further illustrate the effect of the "spot zoning, supra, Fn[3 and 4].

Further, a decision will soon be rendered by the Court of Appeal, Fourth Appellate District, Division One, Case No. D017752, concerning lot U, Map 1343 (i.e., Rescission Judgment of Record against Petitioner as seller

in the amount of approximately $225,000.00), and potentially could result in a Fourth Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One which would further illustrate the effect of the "spot zoning", supra, Fn[3] and [4].

Also, a decision will soon be rendered by the Court of Appeal, Fourth Appellate District, Division One, Case No. D015917, concerning lot T, Map No.1343 (i.e., City of Del Mar required a full Environmental Impact Report at an approximate $38,000.00 estimated cost regarding Petitioner's residence on lot T, Map 1343 and a 20 foot private access easement), and potentially could result in a Fifth Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One which would further illustrate the effect of the "spot zoning", supra, Fn[3] and [4].

At the February 9, 1993 Oral Argument of Case No. D011536 [i.e., this "Petition . . . " (See App. F-1-32)], judicial notice was requested of Case Nos. D015814, D017058 and D017752 (See App. F-16).

Further, Judge Murphy, Department M, North County Superior Court Case No. D017058/N49451, signed on June 29, 1993 orders (See App. X at 1-10), for a Marshall's sale of Petitioner's residence on lots 783 and 784, Map No. 1592; and lots 780, 781, 782, and 785, Map No. 1592; and lot S, Map No. 1285; and Petitioner's non-vested interest purchase money first trust deeds secured by lots H, I, and J, Map No. 1285 (i.e., the subject matter of S033948/D017058, supra), to satisfy the judgment of

record in the amount of approximately $1,400,000.00 discussed, supra.

STATEMENT OF THE CASE

This case involves (20) acres of land in the City of Del Mar, California which among other land was subdivided by final Map Nos. 1285, 1343 and 1592 in 1910, 1911 and 1913. The (20) Snakewall lots range in size from (12) lots 11,245 square feet to 35,380 square feet; and (7) lots one acre or more; and (1) lot 4,818 square feet (App. O at 1-3 and P at 1-2).

On December 9, 1977 Petitioner James E. Smith purchased the (20) Snakewall lots and adjacent streets/alleys which had been vacated in 1925 (App. at Y-1-4), in the City of Del Mar, California. Petitioner paid $805,000.00 (App. at E-3), for the (20) Snakewall lots and vacated streets/alleys which were zoned as described, supra, with the April 28, 1977 Notice of Merger of record in the San Diego County Recorder's Office. (App. at L-12-14 and Q-1-4).

Petitioner as an experienced subdivider always believed the April 28, 1977 recordation of the "Notice of Merger", (App. at L-12-14), was invalid and acquired the (20) Snakewall lots for his interim personal residence, anticipated new residence on lot T, Map No. 1343 and investment. In 1987 Petitioner sold lots K, L and M, Map No. 1285 for $600,000.00. In 1988 Petitioner sold lots G, H, I, J, N and O, Map No. 1285 for $3,525,000.00. In 1989 Petitioner sold lot U, Map No. 1343 for $408,000.00. Petitioner presently owns his residence which is on lot A,

Map No. 1343 and lot 784, Map No. 1592; and lots B and T, Map No. 1343; and lot S, Map No. 1285; and lots 780, 781, 782, 783 and 785, Map No. 1592; and the vacated streets/alleys adjacent to said lots. (App. at E-1-6, K-8-9 and L-1-2).

Even though Petitioner purchased the (20) Snakewall lots on December 9, 1977 (App. at Y-1-4), following the enactment of the January 1, 1977 merger statute and the July 7, 1977 amendment, the record abundantly establishes that in light of Petitioner's extensive background in property development, the property was purchased with the intention that it be owned as shown on the original subdivision maps. (App. at V-1, W-1 and Y-1-4). In other words, although aware the Notice of Merger had been placed upon the property, Petitioner's belief, which was borne out by the City's subsequent Release of the Notice of Merger (App. at L-15-17), was that the Notice of Merger (App. at L-12-14), was invalid.

In any case, just because Petitioner acquired the property following the City Council merger on April 28, 1977, this in no way affected his right to be compensated for the "taking."

> "Nor are the Nollans' rights altered because they acquired the land well after the commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan v. California Coastal Commission*, 483 U.S. 825, at 834, fn. 2. (1987).

The Court of Appeal believed that Petitioner did not have the right to be compensated for a "taking" as a result of his non-ownership of the property at the time the merger was placed upon it (App. at E-15-17). In light of *Nollan*, supra, and *Lucas*, supra, this finding must be examined.

After the October 9, 1985 recordation of the "Release of Notice of Merger" (App. at L-15-17), and the "legal lots" City of Del Mar letter of July 15, 1986 (App. at P-1-2), Petitioner on September 18, 1987 filed an action in the San Diego Superior Court (App. at N-1-15); and first Amended Complaint on September 28, 1988 (App. at M-1-16); and Second Amended Complaint on November 14, 1988 (App. at L-1-38); and the Complaint was amended at judgment (App. at I-1). This action was based on inverse condemnation claiming that the R-1-40, et al., spot zoning (Fn[3] and [4], supra), and "Merger" (App. at L-12-14), so restricted Petitioner's ownership rights that it amounted to a taking of his property without just compensation in violation of both the California and United States Constitutions (App. at L-10-11). The San Diego Superior Court, Judge Lester presiding, found no taking and in favor of Defendant City of Del Mar (App. at I-1-5, J at 1-2 and K at 1-14). Petitioner appealed and the Fourth District Court of Appeals affirmed Judge Lester's judgment (App. at E-1-27).

On May 12, 1993 the California Supreme Court denied Petitioner's Petition for Review (App. at A-1, B-1-18, C-1-16 and D-1-8).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court. This ground for review is present in this case.

I

THE COURT(s) BELOW FAILED TO PROPERLY WEIGH PRIVATE AND PUBLIC INTERESTS WHEN IT APPROVED A REGULATORY TAKING WITHOUT COMPENSATION.

In concluding that no taking occurred, the court(s) below emphasized the fact that Petitioner did not resubdivide or try to sell the lots after the (20) Snakewall lots, as depicted on the original three subdivisions (App. at E-16, K-12, V-1 and W-1), lot lines were destroyed by the April 28, 1977 recordation of the Notice of Merger (App. at E-20-26 and K-14).

This court has repeatedly held, however, that the Just Compensation Clause was designed, " 'not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' " *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 11 (1990) [quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (emphasis in original)].

That property owners are not in every circumstance required to challenge the validity of the governmental

regulation is evidenced by this Court's unambiguous takings test: a taking occurs "if the ordinance does not substantially advance legitimate state interests . . . *or* denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted; emphasis added). See also *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-296 (1981): "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of land . . . ' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987): "We have *long recognized* that land-use regulation does not effect a taking if it 'substantially advance(s) legitimate state interest' and does not 'den(y) an owner economically viable use of his land.' " [Quoting *Agins*, supra, 447 U.S. at 260 (emphasis added; brackets in original).]

This two prong test, like the Just Compensation Clause itself, does not refer to a "balancing" of public and private interests. Indeed, just compensation is mandated when governmental regulations are enacted for the benefit of the public. As the Fifth Amendment provides, "nor shall private property be taken *for public use* without just compensation." (Emphasis added). To require property owners in every instance to challenge the validity of the governmental regulation would twist the Constitution into the following: "Nor shall private property be taken without just compensation, *unless* for a public use."

This Court's decision in *First English*, supra, and its unambiguous either/or takings test, demonstrates the fallacy of the argument that governmental entities are insulated from the just compensation mandate simply because

their land use regulations are valid exercises of the police power.

II

THE MERGER STATUTE DESTROYED NOT ONLY A STRAND IN PETITIONER'S 'BUNDLE OF RIGHTS,' IT DESTROYED THE ENTIRE BUNDLE.

In the case at bar, the subdivision laws of California permitted the creation of the (20) lots at issue herein. Along with their creation were also created certain rights with regard to expectations in the lot(s) ownership. The subdivision laws of California permitted the purchasers of the lots to acquire them in public commerce with the reasonable expectation of owning the lots in a subdivided condition. The rights and attributes of ownership of the lots as a whole was created in each lot individually.

If developing or selling the lots as they were subdivided, were, hypothetically, to constitute a "nuisance," the destruction of those lots would still require compensation. While the errors of private individuals or public officials [City of Del Mar] "cannot estop them from exercising its police power to abate activity akin to a public nuisance," *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, at 488 (1987), it has clearly given rise to certain expectations sufficiently bound up with the notion of property that the City of Del Mar must condemn them and pay for them before it effectively ousts Petitioner from his ownership of lots and "merges" them out of existence.

The test of the Takings Clause is unambiguous, mandating that "private property [shall not] be taken for

public use without just compensation." While Petitioner recognizes that courts may face problems in applying even such plain language to some marginal situations, the Clause's four operative concepts "private property"; "taken"; "public use"; and "just compensation"; are unusually clear, especially as applied to the facts of this case. A person's use of his land is at the very core of the meaning of "private property." See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); ("private property" encompasses not just land as a physical thing, but the bundle of rights "to possess, use and dispose" of the land); *Hodel v. Irving*, 481 U.S. 704, 716-718 (1987) (abolition of descent and devise of land a taking). The bar to develop each lot separately, as well as the bar to sell or devise each lot separately has eliminated essential elements of ownership and deprived Petitioner of private property in the most traditional sense of the term. In its literal sense, the word "taken" certainly comprehends the diminution of the value of land by regulation, as this court's entire regulatory takings jurisprudence affirms. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 at 143-144 (1978) (Rehnquist, J., dissenting). Cf. *Dugan v. Rank*, 372 U.S. 609 at 625 (1963).[6]

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[6] Madison's initial proposal, that "[n]o person shall be . . . obliged to relinquish his property . . . for public use, without just compensation," could perhaps more easily have been construed to be limited to physical deprivations of property. *Speech Proposing the Bill of Rights*, 12 The Papers of James Madison 201 (C. Hobson and R. Rutland eds. 1979). The substitution of the more expansive command that property shall not be "taken" requires the application of the Fifth Amendment to regulatory deprivations of property. See generally *Michelman*, 80 *Harv. L. Rev.* at 1186-1187 ("Wordplay . . . cannot justify any

This Court has also given a plain reading to the limitation that government takings must be for "public use," holding that the power to take is as broad as the police power. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984). The Court has found the concept of "just compensation" similarly clear. See *Dugan*, supra, 372 U.S. at 624-625 (compensation is measured by the extent of the deprivation of property, i.e., "the difference in market value of the [property] before and after the . . . taking"). The language of the Takings Clause is therefore plain, and it admits of no exception. Although government may deprive a person of his property in order to put it to public use, government's right to do so is conditioned on the payment of just compensation.

It should be paid under the facts of this case where Petitioner has had, not a strand, but his entire 'bundle of rights' destroyed.

Additionally, it must be remembered that *the merger statute was new to this state* when enacted effective January 1, 1977. None existed prior to 1976 when the merger statute Govt. Code § 66424.2 was added by stats. 1976, Chapter 928.[7] This is critical in the "taking" analysis because mergers are not inherent in the taking of title to lots in California. Referring to the "physical occupation" of land cases where the courts "have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests"

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sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint.").

[7] See Historical Note to Calif. Govt. Code § 66424.2.

involved, *Loretto v. Teleprompter Manhattan CATV Corp,* 458 U.S. 419 at 426 (1982, [102 S.Ct. at 3171] – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title," (emphasis added by Court.) *Lucas v. South Carolina Coastal Council,* (1992) ___ U.S. ___ [112 S. Ct. 2886, 2900].

> "We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the results that could have been achieved in the courts – by adjacent landowners, (or other uniquely affected persons) under the states law of private nuisance, or by the state under its complimentary power to abate nuisances that affect the public generally or otherwise . . .
>
> When a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles could dictate, compensation must be paid to sustain it." *Lucas v. South Carolina Coastal Council,* (1992) ___ U.S. ___ [112 S. Ct. 2886 at 2900-2901].

The idea of "merging" lots that were previously created by lawful subdivisions was not known within the confines of our common law. Likewise, developing and selling property in its home site divided fashion was not

prohibited at common law and should not be allowed to be prohibited now.

III

THE MERGER DESTROYED THE EXISTENCE OF (20) SNAKEWALL LOTS.

Petitioner's (20) Snakewall lots were zoned for residential use (App. at V-1-3 and W-1), and the lots were created under the subdivision regulations of the State of California. While zoning laws are restrictions on the use of land, the zoning law here permitting residential use merely affirms the common law right already possessed by Petitioner.

Furthermore, the subdivision of the property into (20) lots created the same rights any individual would have in one lot, except (20) fold. No one can dispute that had any of the (20) lots been physically taken by the government that compensation would be required to be paid to Petitioner.

This Court has affirmed the common law doctrine that certain strands among the bundle of rights are essential attributes of its ownership, without which property itself could not exist. Among these rights is the right to possess, use, and dispose of property. *United States v. General Motors Corp.*, 323 U.S. 373 at 377 (1945).

Aside from the fact that many jurists may consider the right to build a home on a lot a fundamental right, clearly the destruction of the lot(s) takes away the fundamental rights to possess, use and dispose of the lot(s).

The effect the merger statute had upon the (20) Snakewall lots was to "merge (20) lots into one parcel" (App. at E-2 and L-13). In exchange for (20) distinct individual rights to alienate 20 separate home site lots, Petitioner was given one (20) acre parcel. What can be said other than "a taking" about the destruction of (20) homesite lots and their transformation into one (20) acre parcel. Clearly, in this case, the inverses are not equal.

> "The critical terms [of the Takings Clause] are 'property,' 'Taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by the law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter." *United States v. General Motors Corp.*, supra, 323 U.S. 373, 377-78 (1945).

Traditionally, much of "takings" jurisprudence has dealt with restrictions imposed upon the land which in the view of the Court "went too far" so as to amount to a taking of the property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lucas v. South Carolina Coastal Council*, (1992) ___ U.S. ___ [112 S. Ct. 2886] involving restriction on the right to build a home.

The present case, however, does not only involve a "spot zoning" restriction with no property development standards (App. at V-2-3 and Fn[3] and [4], supra), on the use of the property, but in addition, the "merger" statute, while allowing the owner to remain in possession of the

property, destroyed each and all of the rights inherent in the property, [including voting rights (App. at S-1-3)], which had been legally subdivided; to wit: The value of the property in its subdivided state is completely destroyed.

Government's physical occupation of land is almost invariably held to be a compensable exercise of the power of eminent domain, whatever the purpose of the taking. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, at 488 Fn. 18 (1987). When government instead entirely destroys tne value of land by regulation, the economic effect and impact on the owner's liberty are indistinguishable. See *Williamson Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 at 185 (1985). Cf. *United States v. Lynah*, 188 U.S. 445 at 470 (1903) (when government "takes away the use and value" of land, "it is of little consequence in whom the fee may be vested"; there is a taking even though the government does not "appropriate the title.").

This Court's cases thus firmly stand for the proposition that government may not achieve its goal, however laudable, by the "complete extinction of the value of a parcel of property" unless it pays just compensation for the taking. *Keystone Coal*, supra, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

Not only was the value and use of Petitioner's (20) lots destroyed totally, but in fact the "merger" statute went even further and destroyed the lots themselves. The judgment below must accordingly be reversed.

IV

DESTRUCTION OF "ALL" ECONOMICALLY VIABLE USE OF THE (20) SNAKEWALL LOTS ENTITLES THE OWNER TO JUST COMPENSATION.

The trial court took the position that in order to have "regulatory temporary takings one must be deprived of either the economic viability of his property or virtually all use when there is a temporary regulatory taking alleged" (App. at K-5). The trial court took a very literal approach to these concepts. Following the finding that not "all use" had been taken, the trial court found the following "uses" to which the property could be put. " . . . beautiful ocean and inland view . . . "; and " . . . walk his beloved dogs . . . "; and "occupy the largest estate in the City of Del Mar" (App. at K-8). And finally, "[t]he court notes, after personally walking the property . . . that the Snakewall property is unique, beautiful property with walking trails, torrey pines, sandstone bluffs, panoramic views of ocean and inland, a beautiful residence and separate guest house. Only a handful of royalty on a worldwide basis could compare with such living conditions as Mr. Smith . . . has enjoyed since 1977. The nature and extent of this use alone should be sufficient to find a valuable alternative use other than what the merger made more difficult, i.e., individual lot sales" (App. at K-8-9).

It is submitted that being able to walk over and view your own property is not the type of "use" which takings jurisprudence intended to be considered when doing a 'takings' analysis. Otherwise, if Petitioner had unfortunately become a paraplegic who had also lost his vision

then it seems the trial court would have found that there had been a taking effected by the merger.

Mirroring the trial court, the appellate court held, "[A]s the trial court found, Smith retained the right to use and enjoy the estate as a single piece of property and to sell the Snakewall as a single property" (App. at E-16).

The crux of the appellate court's misunderstanding with regard to "takings" law is found in their follow-up comment to their preceding holding wherein the court states:

> "Payment of compensation is based on the premise there was a temporary deprivation by an excessive regulation. Since Smith was not trying to develop or sell the lots of the old subdivision, but only trying to sell the property as a whole it cannot be said the merger resulted in temporarily taking a property interest from Smith." (App. at E-16).

This type of circular reasoning demonstrates the apparent difficulty the appellate court had when it attempted to articulate the "uses" to which the property could still be put post merger. Seemingly, both the trial and appellate court need reminding that in its merged state, the (20) lots could not be sold individually. It seems almost farcical to suggest that Petitioner should be somewhat penalized for attempting to market a piece of property in precisely the fashion the government said the property must exist in (i.e., merged one parcel).

Once again, in order to have been compensated for this "taking" Petitioner apparently would have had to

have been paraplegic, blind, and attempting to market non-existent individual lots.

The critical inquiry in this case must address the economically beneficial uses which were taken away from Petitioner by virtue of the merger. After all, the Fifth Amendment is concerned with "Taking", not what remains. Furthermore, we are concerned here with a state statute misinterpreted by the city which denies the property owner all economically viable and productive use of his lots, not whether or not he can still walk around on it and look at it.

The question then boils down to whether owning one (20) acre parcel versus (20) R-1 home site lots means that the owner has not been deprived of "all economically viable or productive use" of his property sufficient to constitute a taking? This is precisely what the courts below limited their analysis to and did so in error. This myopic view completely disregards the economic impact upon Petitioner as a result of the destruction of the (20) R-1 home site lots.

Both courts below found that a single (20) acre parcel had potential viable economic use which was available to the owner and thus precluded a "takings" challenge.

In addition to finding that the aesthetically pleasing grounds provided a sufficient valuable alternative use so as to preclude a "takings" claim, both courts below felt that the ability to market the property as a "whole" was the primary preclusion (App. at E-19 and K-9-10).

The appellate court below was in a position to analyze and examine thoroughly the contention that

"marketing the property as a whole" ignores the right to separately develop and convey the (20) lots as lawfully subdivided (App. at E-16). However, short shrift was given this contention as the court hastily proceeded to examine Petitioner's right to even allege a "taking" (App. at E-17).

This Court's recent ruling in *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___, [112 S. Ct. 2886], established that the ability to market the property in its restricted condition does not, in and of itself, mean that the owner has property with "economically viable or productive uses" left in it, thereby precluding a "taking" claim.

If Petitioner, similar to *Lucas*, had lots which were restricted such that no building or development could occur on them, then clearly there would be no question that would be a "taking" under *Lucas*. This case, presently goes one step farther. Not only has the right to construct a single-family residence on the lots been taken away, the lots themselves have been destroyed. It seems that there could be no clearer example of a deprivation of all economically viable and productive use justifying just compensation than this case.

V

ELIMINATION OF ALL ECONOMIC VALUE IS FOUND WHEN LEGALLY SUBDIVIDED LOTS ARE BY REGULATION DECLARED DESTROYED AND NONEXISTENT.

The notion that the government can reach with impunity so deeply into the bundle of rights constituting

ownership of property as to deny all economically viable use of it, without paying for the extinction of those rights, threatens the very bedrock notions of private ownership of land to which the Fifth Amendment is addressed. [See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, at 511-515 (1987) (Rehnquist, J., dissenting)]. If this case does not present a regulatory taking it is difficult to imagine the case that would.

The property in question had been legally and lawfully subdivided in 1910-1913 (App. at E-2, K-1 and 10 and Y-1-4).

Final Map Nos. 1285, 1343 and 1592 created, among numerous other lots, (20) separate and distinct R-1 homesite lots with each lot having its own set of property rights. Along with the right to build, each lot could be sold individually. Each lot could be used and possessed separately from the others. The only economically viable use for the lot(s) was in their development as R-1 home sites. In fact, it could be said that the purpose for subdividing R-1 property is to create a home site. Un-subdivided the property has lost its economically viable or productive use as (20) R-1 home sites.

If the government so diminishes the value of land in advancing its good ends that the land becomes worthless by nonexistence [i.e. (20) lot lines destroyed], then without more, it is a taking.

Stripping property of its subdivided status leaves Petitioner nothing more than one parcel of land and the Constitution forbids it without compensation. This Court has recognized that one of the most fundamental rights inhering in land ownership is the right to make some

economically viable use of it, when it has been acquired with a bona fide expectation that it can be so used. [See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 143 (1978) (Rehnquist, J., dissenting.]

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) the court assumed because of the posture of that case that the Ordinance in question had taken all use of the church's property. It concluded that were such denial of all use proved, it would constitute a taking. In this case the trial court found that the aesthetic value of the property to the owner was a sufficient alternative use precluding a taking claim. Relying upon *First English* the trial court emphasized the concept of "all use" literally by citing no less than (5) passages from *First English* wherein the court used the language "all use" (App. at K-11-12). Presumably, the trial court was aware that the property in question in *First English* could have been marketed and sold by the church. Furthermore, given that beauty is in the eye of the beholder, the parishioners in *First English* could have, similar to Petitioner, walked about and viewed the vistas and beautiful landscape of their property, thereby having a "valuable alternative use", thus precluding a taking claim, the same as the trial court found with regard to Petitioner's (20) R-1 lots. (See App. K-8-9).

The Court in *First English* did not find that these other attributes of ownership, although arguably a technical "use" of the land, were even worthy of mention in the context of a "takings" analysis and similarly they should be so viewed with regard to the trial court's findings in this case.

Petitioner does point out that he is not unaware of the consequential distinction between those cases in which a regulation has eliminated a particular use of a parcel of property in "nuisance" type cases. [See *Mugler v. State of Kansas*, 123 U.S. 623 (1887)]; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); and *Miller v. Schoene*, 276 U.S. 272 (1928); and those situations in which regulations have eliminated all economically viable use of the property for any private purpose. Compare *Mugler* (prohibition of the use of property as a brewery not a taking) with *Curtin v. Benson*, 222 U.S. 78 (1911) (prohibition on use of national park lands for grazing a taking). Presumably the property on which "nuisance uses" once existed could yet be put to other lawful and valuable use. Petitioner's (20) R-1 lots plainly could not have been put to any other lawful uses, so long as they remained in a "merged" one parcel condition. The use was in the (20) R-1 lots as they were subdivided. To say that a "merged" one parcel lot has only lost a particular use would be a grievous over simplification. All uses of property could be broken down into component parts and if restricted could be said to have been a particular use. Hence, there would never be a case in which a diminution in value could constitute a taking. [See *Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895 at 905 (1991) (Harwell, J., dissenting)].

Owning the (20) R-1 lots in their subdivided state is the essence of Petitioner's ownership. It is the only condition in which the (20) R-1 lots have any economically viable use or productivity.

Destroying the (20) R-1 lots attribute of ownership is a taking.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioner to file his brief and to articulate more comprehensively why the Court below was wrong in its opinion which was made seemingly in complete disregard of the *Lucas*, supra, opinion.

Although recognizing that "takings" law is an area of considerable confusion, Petitioner submits that the case at bar presents as clear cut an issue on "taking" as one will find. So clear cut is this "takings" case in light of *Lucas*, supra, that this Court may well deign to summarily decide this case.

Respectfully submitted,

Dated: July 30, 1993

/s/ James E. Smith
James E. Smith
Propria Persona

APPENDIX

APPENDIX A

Fourth Appellate District, Division One, No. D011536
S032104

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed May 12, 1993)

JAMES E. SMITH, Appellant

v.

CITY OF DEL MAR, Respondent

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX B

CIVIL NO. S032104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Plaintiff and Appellant, vs. The City of Del Mar, Defendant and Respondent.	)	CIVIL NO. S032104

PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court of the State of California, San Diego County Honorable J. Morgan Lester, Judge

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for Appellant

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COURT: THE SUPREME COURT, STATE OF CALIFORNIA; CASE NAME: JAMES E. SMITH, APPELLANT VS. THE CITY OF DEL MAR, RESPONDENT; CASE NO. D011536; (Fourth DCA, Div. One).

PROOF OF FILING AND SERVICE BY MAIL

I, Sue J. Nielsen, declare that I am over the age of eighteen years and not a party to this action; my business address is 5665 Oberlin Drive, Suite 100, San Diego, California 92121; that I served the below named the following documents in the following manner: PETITION FOR REVIEW AND PROOF OF FILING AND SERVICE,

1) ____ By having copies personally served on the below listed person by KNOX ATTORNEY SERVICE.

2) ____ By leaving, during usual office hours, copies in the office the person served with the person who apparently was in charge and thereafter mailing (by first class mail, postage prepaid) copies to the person served at the place where copies were left.

3) ____ By leaving copies at the dwelling house, usual place of abode or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who was informed of the general nature of the papers and thereafter mailing (via first class mail, postage prepaid) copies of the person served at the place where copies were left.

4) XXX By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on April 1, 1993.

California Supreme Court
South Tower – Eighth Floor
303 Second Street
San Francisco, Calif. 94107
(Original and 13 copies)

Lynn R. McDougal, Esq.
McDougal, Love et al,
Attorneys at Law
460 N. Magnolia Ave., Drawer 1466
El Cajon, CA 92002
Attorney for Respondent
(1 copy)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" St., Suite 500
San Diego, CA 92101
(1 copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 1993 at San Diego, California.

/s/ Sue J. Nelsen
Sue J. Nelsen

Robert L. Zajac, Esq. – No. 110164
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A Professional Corporation
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San Diego, California 92101
(619) 234-6121
8131.7
Attorneys for JAMES E. SMITH

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

JAMES E. SMITH, Plaintiff/Appellant, v. THE CITY OF DEL MAR Defendant/Respondent.	CASE No. D011536 SUBSTITUTION OF ATTORNEYS [CCP § 284(1)]

Plaintiff/Appellant James E. Smith ("Smith") herein, substitutes himself, in pro per, as the attorney or record in the above-referenced matter, in the place and stead of the law firm of Hillyer & Irwin.

The address of the new attorney of record is James E. Smith, 2100 Gatun Street, Del Mar, California 92014.

Dated: 3/27/93
@1329

James E. Smith
2100 Gatun Street
Del Mar, CA 92014
Ph: 619-755-7794

By: /s/ James E. Smith
James E. Smith,
Plaintiff and Appellant In Pro Per

The undersigned accepts the above substitution.

Dated March 22, 1993 HILLYER & IRWIN

By: /s/ Robert L. Zajac
ROBERT L. ZAJAC

COURT: THE SUPREME COURT, STATE OF CALIFORNIA; CASE NAME: JAMES E. SMITH, APPELLANT VS. THE CITY OF DEL MAR, RESPONDENT; CASE NO. D011536; (Fourth DCA, Div. One).

PROOF OF FILING AND SERVICE BY MAIL

I, Sue J. Nielsen, declare that I am over the age of eighteen years and not a party to this action; my business address is 5665 Oberlin Drive, Suite 100, San Diego, California 92121; that I served the below named the following documents in the following manner: SUBSTITUTION OF ATTORNEY AND PROOF OF FILING AND SERVICE,

1) ____ By having copies personally served on the below listed person by KNOX ATTORNEY SERVICE.

2) ____ By leaving, during usual office hours, copies in the office the person served with the person who apparently was in charge and thereafter mailing (by first class mail, postage prepaid) copies to the person served at the place where copies were left.

3) ____ By leaving copies at the dwelling house, usual place of abode or usual place of business of the pe[illegible]erved in the presence of a competent m[illegible]f the household or a person apparently i[illegible]rge of his office or place of business, at [illegible]ast 18 years of age, who was informed [illegible]he general nature of the papers and there[illegible] mailing (via first class mail,

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4) XXX By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on April 1, 1993.

California Supreme Court
South Tower – Eighth Floor
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Lynn R. McDougal, Esq.
McDougal, Love et al,
Attorneys at Law
460 N. Magnolia Ave., Drawer 1466
El Cajon, CA 92002
Attorney for Respondent
(1 copy)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" St., Suite 500
San Diego, CA 92101
(Original)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 1993 at San Diego, California.

/s/ Sue J. Nelsen
Sue J. Nelsen

CIVIL NO. D011536

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Plaintiff and Appellant, vs. The City of Del Mar Defendant and Respondent.	)	CIVIL NO. D011536

PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court of the State of California, San Diego County
Honorable J. Morgan Lester, Judge

To the Honorable Malcolm Lucas, Chief Justice and to the Honorable Associate Justices of the Supreme Court of California:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Petition presents for review the issue of a governmental "temporary taking" of the Statutory Fundamental Vested Right under Govt. Code § 66424 to " . . . sell, lease or finance . . . " the (20) Final Recorded Subdivision Map Nos. 1285, 1343, and 1592 lots, collectively referred to as the "Snakewall Property", from 12/9/77 to 10/8/85, under the guise of "merger at Govt. Code § 66424.2 enacted 1/1/77 and amended 7/7/77.

James E. Smith, Appellant, hereby petitions for review of the decision of the Court of Appeal of the State

of California, Fourth Appellate District, Division One, filed in this action on February 22, 1993, affirming the judgment of the trial court in favor of Respondent. A copy of the decision of the Court of Appeal showing the date of its filing, ie 2/22/93, is set forth herein as Appendix "A" (27 pgs.).

Review by this Court is necessary on the ground that the decision of the Court of Appeal is not in line with the authorities cited herein and this Court's ruling is necessary to secure uniformity of decision and settlement of important questions of law.

BRIEF IN SUPPORT OF REQUEST FOR REVIEW

POINT I

GOVT. CODE § 66424.2 WAS IMPROPERLY APPLIED TO EFFECTUATE A MERGER OF THE (20) SNAKE-WALL LOTS.

The analysis of the 1/1/77 § 66424.2 enactment and the 7/7/77 amendment by the Atty. Gen. at 62 Ops. Cal. Atty. Gen. 281 (1979) referenced at Appendix "A" p. 13 of the "decision" addresses only question three of four separate questions stated and answered in said 62 Ops. The conclusions to the three questions the "decision" *does not address* clearly support Appellant's position. "The four questions presented for analysis concern the proper interpretation of Government Code section 66424.2 . . . " (p.282). *Emphasis added.* These four conclusions, for convenience to this Court, are as follows:

> "1. The conclusion to the first question, therefore, is that parcels *did not meet* the conditions for merger under section 66242.2 as enacted

effective January 1, 1977, if they were then eligible for use or development pursuant to an existing local ordinance. (p.285.)

2. The conclusion to the second question, therefore, is that parcels *do not meet* the conditions of merger in section 66424.2 as amended effective July 7, 1977, if they are eligible for use or development under the existing local ordinance. (p.286.)

3. The conclusion to the third guestion [sic], therefore, is that the 1977 amendment of section 66424.2 *did not specifically* unmerge any particular parcels of property. (p.286.)

4. The conclusion to the fourth question, therefore, is that for purposes of the Act, any parcels that were merged by the original enactment of section 66424.2 *may be deemed unmerged* by ordinance of a local agency pursuant to the 1977 amendment of the statute." (p.286.) *Emphasis Added.*

In Addition 62 Ops. states the following:

"In enacting section 66424.2, the Legislature's apparent general purpose was to make clear *that parcels did not merge for purposes of the Act if they had been created in compliance with existing subdivision laws and regulations.* In effect, the statutue [sic] reversed an erroneous conclusion reached in 56 Ops. Cal. Atty. Gen. 509, 512-513 (1973), and codified the conclusion reached in 59 Ops. Cal. Atty. Gen. 239, 241 (1976), where we stated: . . . (p. 284).

. . . a parcel once recorded under the Subdivision Map Act need not be re-recorded so long as it is not further subdivided. (p.284.)

> . . . we can find no expression of legislative intent to support a restrictive interpretation of the word 'standards' in section 66424.2. (p.285.)
>
> In addition, as previously noted, we must strictly construe the merger exception language of section 66424.2 in favor of the general non-merger rule. Consequently, a liberal interpretation of the phrase 'standards for minimum parcel size' is appropriate. (p.285.)
>
> Consequently, we believe that between January 1, 1977, and July 7, 1977, a local ordinance could have established 'standards for minimum parcel size to permit use or development' under section 66424.2 by referring to factors other than numerical measurements. *Allowing use or development of any parcel that has been duly subdivided and recorded would have been such a 'standard' for minimum size."* (p.285.) Emphasis added.

Appellant's position, as amplified by 62 ops. above, is that § 66424.2 as enacted on 1/1/77 and as amended on 7/7/77 precluded "merger" of the (20) lots as said (20) lots were on 1/1/77 and 7/7/77 then eligible for use or development pursuant to an existing local ordinance.

POINT II

IN LIGHT OF THE RECENT U.S. SUPREME COURT DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* THE MERGER STATUTE AT ISSUE AMOUNTED TO A CONFISCATORY REGULATION.

As far as the "taking" analysis is concerned it was felt by The Fourth District Court of Appeals that whether

or not the merger was unlawful really had no bearing upon the issue of "taking". (opinion, p. 15).

Appellant submits that the *Lucas* decision, infra, unequivocally supports Appellant's "taking" claim. "All economically beneficial use" of (18) of the (20) Snakewall lots was taken by virtue of the merger. *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___ [112 S. Ct. 2886, 2893]. This merger left Appellant, as owner of the (18) lots not utilized by his residence, without "economically beneficial or productive use" of (18) lots. In the case at bar, not unlike *Lucas*, the 4/28/77 Recorded Notice of Merger required the Snakewall lots to be left in their natural state thereby pressing Appellant's private property into a form of public service under the guise of mitigating serious public harm. Appellant's property was zoned, among other designations, as open space. See, e.g. *Annicelli v. South Kingstown*, (R.I. 1983) 463 A. 2d 133, 140-141 (prohibition on construction adjacent to beach justified on twin grounds of safety and 'conservation of open space').

Even though Appellant purchased the (20) Snakewall lots on 12/9/77 following the enactment of the 1/1/77 merger statute and the 7/7/77 amendment, the record abundantly establishes that in light of the Appellant's extensive background in property development, the property was purchased with the intention that it be owned as shown on the original subdivision maps. In other words, although aware the Notice of Merger had been placed upon the property, Appellant's belief, which was borne out by the City's subsequent removal of the Notice of Merger, was that the Notice of Merger was invalid.

In any case, just because Appellant acquired the property following the City Council merger on 4/28/77 would in no way have affected his right to be compensated for the 'taking'.

> "Nor are the Nollans' rights altered because they acquired the land well after the commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, at 834, fn. 2.

The Court of Appeal believed that appellant did not have the right to be compensated for a 'taking' as a result of his non-ownership of the property at the time the merger was placed upon it. (See Opinion, Appendix "A", p.17.) In light of *Nollan*, supra, this finding must be examined.

At the crux of this Petition is an examination of the language "all economically beneficial or productive use" of ones property. If "all economically beneficial or productive use" has been eliminated then there is a 'taking'. The property, pursuant to lawful governmental authority, was legally subdivided in 1910, 1911 and 1913 into (20) lots. By merging the property these (20) lots were extinguished. The fact that the (20) lots were converted to one large parcel with concededly some value does not mean that there was no taking.

In *Lucas* the property was restricted in such a way that all building was prohibited on the property. However, clearly the land could be sold, the owner had the right to exclude others, he could picnic, swim, camp in a tent or live on the property in a movable trailer. He could also have alienated the land. *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___ [112 S. CT. 2886, 2903, J. Kennedy's concurrence; 2908, J. Blackman's dissent.]

In the case at bar, the Appellate Court found that the fact Appellant was free to use the property as a "single building site", (Opinion, p.19), precluded a "taking" claim because not "all economically beneficial or productive use" of the land was gone. Just like *Lucas,* supra, and in an even stronger fashion, the *right* to build was not just restricted in the case at bar, it was taken away. In the case at bar, not only was the right to develop (18) separate lots taken away, (2 lots being Appellant's residence), but the right to sell, lease or finance each of those (18) lots separately was extinguished. (Govt. Code § 66424). This right to sell, lease or finance those lots separately was one of the fundamental vested rights which Appellant acquired as a "stick in the bundle of rights" when he purchased the property.

Appellant had the intent and capacity to develop or sell the lots individually. However, virtually any court in the State could judicially notice that a (20) acre parcel in the heart of a residential section of Del Mar, California, zoned to the hilt and not subdivided, would have a diminished value compared to subdivided R-1 lots. To say otherwise is the equivalent of making the statement

that Confederate money has value.[1] Furthermore, pursuant to *Lucas*, supra, this stated value is not the tuning [sic] point upon which a taking case is decided.

The merger not only deprived Appellant of any reasonable economic use of the (18) lots, as was the case with *Lucas*, (*Lucas*, supra, at 2890 as found by the *Lucas* trial Court), but deprived Appellant of "all" use of the (18) lots. Ceasing to exist, the lots thereby became "valueless" in the strictest sense of that word's meaning.

This type of regulation effectively goes beyond even a physical taking, as in the condemnation cases, because all development has been prevented, the land has been preserved in it's natural state, and all of this has been accomplished without the expenditure of any monies by the government. To say that Appellant is free to develop the (20) acre parcel as a single parcel only is obviously a hallow [sic] statement. The statement refers to a freedom whose existence cannot be denied, yet whose exercise is more than unlikely for a multitude of reasons not within the control of the land owner. In other words, it is a freedom we all have by virtue of being born in the United States, just like we all have the freedom to seek to become president, and or etc.

Appellant submits that this freedom of use of the (20) acre parcel does not and should not be included in the

---

[1] Also, pending are Fourth DCA Case Nos. D015814, D015917, D017058 and D017742; and Judicial Notice was requested on 2/8/93 at D011536 oral argument for all except D017742 in which Appellant's Opening Brief was filed and served by mail on 3/23/93.

equation of consideration of what constitutes an economically beneficial or productive use of land.

Therefore, given that, aside from selling the land, the number of ways a (20) acre parcel can be utilized in an 'economically beneficial or productive' way when that parcel is located in Del Mar, California is practically zero. Only in words and on paper could the government effectively resist a taking claim by merely proclaiming that not "all economically viable use" of the property was gone as a result of the regulation because the owner is free to develop or sell the 20 acre parcel.

Additionally, it must be remembered that the merger statute was new to this state when enacted effective 1/1/77. None existed prior to 1976 when the merger statute Govt. Code § 66424.2 was added by stats. 1976, c. 928.[2] This is critical in the "taking" analysis because mergers are not inherent in the taking of title to lots in California. Referring to the "physical occupation" of land cases where the courts "have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S., at 426, [102 S.CT. at 3171] – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title," (emphasis added by Court.) *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___ [112 S. CT. 2886, 2900].

---

[2] See Historical Note to Govt. Code § 66424.2

> "We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners, (or other uniquely affected persons) under the states law of private nuisance, or by the state under its complimentary power to abate nuisances that affect the public generally or otherwise . . .
>
> When a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles could dictate, compensation must be paid to sustain it." *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___ [112 S. Ct.2886 at 2900-2901].

Appellant has shown that the merger of the 20 lots eliminated all meaningful economically beneficial or productive use of the (18) lots, so much so that the lots themselves were destroyed. This was done by way of new legislation at the time being applied improperly to lawfully subdivided lots. Under no stretch of the governmental imagination could the merger statute as applied to the Snakewall lots be said to be duplicative of the results that could have been achieved in the courts by adjacent land owners under California's nuisance laws. After all, the surrounding lots are developed and sold as single-

family residences. This is precisely the type of development previously anticipated pursuant to the Final Maps for the Snakewall (20) lots. *Lucas,* supra, at 2900.

The merger was not known within the confines of our common law. Likewise, developing and selling property in a divided fashion was not prohibited at common law. In fact it could probably be safely stated that dividing and subdividing property for economically beneficial and productive use is as much a part of the fabric of our common law as is the right to be compensated for a taking of that property by the government.

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Court grant this petition for review and order the within appeal transferred to it.

Respectfully Submitted,

/s/ James E. Smith
James E. Smith
Propria Persona For
Appellant

4-1-93
@1051

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Plaintiff and Appellant, vs. The City of Del Mar, Defendant and Respondent.	)	NO. S032104

ANSWER TO PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court of the State of California, San Diego County Honorable J. Morgan Lester, Judge

Lynn R. McDougal, Esq.
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Attorneys for
Defendant/Respondent

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NO. S032104

IN THE
SUPREME COURT OF CALIFORNIA

James E. Smith,
Plaintiff and Appellant,

vs.

The City of Del Mar
Defendant and Respondent.

ANSWER TO PETITION FOR REVIEW

Respondent, CITY OF DEL MAR, (hereafter "DEL MAR"), hereby answers JAMES SMITH's Petition for Review of the decision of the Court of Appeal, State of California, Fourth Appellate District, Division One, filed

in this action on February 22, 1993 ("Opinion"), in favor of Respondent DEL MAR. A copy of the decision of the Court of Appeal is attached to the Petition as Appendix A.

I. FACTS AND STATEMENT OF THE CASE

Plaintiff and Appellant JAMES E. SMITH (hereafter "SMITH") purchased approximately 20 acres of real property located in DEL MAR containing one developed parcel in December of 1977. Prior to SMITH's purchase, the subject property had consisted of 20 lots which had been merged pursuant to then California Government Code § 66424.2 because the subject property contained contiguous, commonly-owned, undeveloped, substandard-sized lots consistent with the Section's provisions. SMITH claimed DEL MAR's merger was invalid and the he was entitled to compensation for a "temporary taking" of the subject property during the period the allegedly invalid merger was in effect. (The merger was released in 1985 by DEL MAR pursuant to SMITH's request.)

Based on its careful interpretation of legislation concerning mergers of real property and its application of the law concerning regulatory takings of property to the facts found by the trial court (Opinion, pp. 7-20), the Court of Appeal concluded that not only had SMITH's property been validly merged, but that Defendant DEL MAR had not taken SMITH's property without just compensation, either through the merger or through zoning regulations. The Court of Appeal also upheld the trial court's determination that DEL MAR was not liable to SMITH for any alleged failure to advise the Del Mar Civic

Association that he had 20 votes, rather than the one vote the Association decided he had. The Court of Appeal rejected SMITH's claim that a different outcome would have resulted in the Association's vote which conveyed certain beach land in which SMITH claimed an interest to Del Mar.

The single issue presented for review is whether the merger of 20 lots on SMITH's property into one lot prior to his purchase constituted a temporary taking requiring compensation for the time period from SMITH's purchase date in December of 1977 until DEL MAR "unmerged" the property in October of 1985 at SMITH's request.

SMITH now relies on portions of an Attorney General opinion concerning amendments to California Government Code § 66424.2 already considered and discussed by the Court of Appeal, to dispute the Court of Appeal's interpretation of the effect of § 66424.2 on the subject property. He claims that the other portions of the Attorney General opinion are dispositive in his favor, and conflict with the Court of Appeal's findings. This position was both impliedly and expressly rejected by the Court of Appeal, which acknowledge the applicability of the third question and answer (where the Attorney General opined that no parcels were unmerged as a result of the 1977 amendment). The Court of Appeal also explained how Defendant's merger fell into the statutory exception to the Attorney General's answer to the first question (which permitted DEL MAR to merge contiguous, commonly-owned, undeveloped substandard-sized lots regardless of any code merger or "unmerger" provisions). Thus, the same Attorney General opinion which SMITH

contends supports his position contained significant discussion reinforcing the Court of Appeal's interpretation of the statute and determination that the merger was valid.

As the second prong of SMITH's argument concerning the one issue submitted for review, SMITH urges that the Court of Appeal incorrectly read and applied *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___, 112 S.Ct. 2886, and its predecessor cases concerning the circumstances under which regulations become confiscatory and require compensation. The Court of Appeal reviewed substantial evidence, including over twenty volumes of Reporter's Transcripts, six volumes of Clerk's Transcripts and "numerous" exhibits. The Court then determined that there had been no taking under the "regulatory taking" line of cases, because SMITH had not been deprived of all economically beneficial use of his property – the one merged lot he had originally purchased, and which he was not prevented from resubdividing –, and because SMITH failed to show that no legitimate state interest had been substantially advanced. This finding was consistent with both the letter and the spirit of *Lucas, supra.*

SMITH's petition for review should be denied on the merits, as set forth above, but also on the grounds that it was untimely filed. SMITH failed to file his petition by the deadline date of April 5, 1993, a date which cannot be extended under California Rule of Court 45(c). SMITH's petition is without merit and is also untimely. This Court is therefore requested to deny SMITH's petition for review.

II. A PETITION FOR SUPREME COURT REVIEW SHOULD BE DENIED WHERE NO GRAVE OR SIGNIFICANT ISSUE IS PRESENTED.

California Rules of Court, Rule 29(a) sets forth the grounds for review by the Supreme Court of a decision of a Court of Appeal, in pertinent part as follows:

> " . . . (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; . . . "

In *People v. Davis* (1905) 147 Cal. 346, 349-350, the Supreme Court determined that there could be no second appeal to the Supreme Court on the merits of the decision alone. California Rule of Court ("C.R.C.") Rule 29(a) statutorily confirms that review must be limited to those instances, aside from procedural grounds, where appellate jurisdictions have rendered conflicting opinions, or where significant questions of law are presented. Thus, SMITH's petition must be denied if his challenge amounts only to a request for a review of the merits of the Court of Appeal's decision, as DEL MAR claims herein.

Additionally, Rule 29(b)(2) provides that the Supreme Court normally will not consider an issue or fact that was omitted from the Opinion of the Court of Appeal. SMITH should therefore not be permitted to raise any new issue concerning the effect of "new [sic] legislation" in the "taking" analysis, when that issue was neither submitted for review by the Court of Appeal nor contained in its "taking" analysis.

A. GROUNDS FOR REVIEW ARE LIMITED

SMITH broadly states that review is necessary on the grounds that "the decision of the Court of Appeal is not in line with the authorities cited herein and this Court's ruling is necessary to secure uniformity of decision and settlement of important questions of law." DEL MAR submits that none of these claims has merit.

SMITH states as an issue presented for review that "this Court's ruling is necessary to secure uniformity of decision. . . . " Presumably SMITH is attempting to rely upon the Rule 29(a) provision permitting Supreme Court review on that ground. SMITH fails to provide any support in his petition for that claim, however; he does not point to any other California appellate jurisdiction which has rendered an opinion conflicting with the Fourth District Court of Appeal's decision rendered herein.

SMITH also seeks review to permit "settlement of important questions of law" but fails to either explain this claim or cite any support for it. Thus, this Court may only speculate as to which important question of law remains to be settled. Significantly, the Court of Appeal directed that its opinion not be published, from which the inference may be reasonably drawn, consistent with C.R.C. 976(b), that no significant legal issues were presented by the case.

Finally, as is set forth in detail below, the Court of Appeal's decision *is* "in line with the authorities cited" in SMITH's brief, although this would not have been an appropriate ground for review in any event, under *People v. Davis, supra.*

DEL MAR therefore submits that because this Court will review a decision only under narrow circumstances and on limited grounds, SMITH's grounds, whether stated or implied, are insufficient to justify review.

B. ISSUES PRESENTED AFFECT SMITH ONLY AND WILL NOT SETTLE IMPORTANT QUESTIONS OF LAW

As stated above, C.R.C. Rule 29(a)(1) provides in part that review will be ordered where necessary to settle important questions of law. In the instant case, an altered decision could only affect the parties involved. That is, SMITH presents no unique and justified theory of law, cites no case which could be understood to be a companion case, nor in any manner states a view of the issues broader than that encompassing the parties in this case.

SMITH thus states no issue, as presented or implied, for which review could potentially settle *any* question of law, significant or otherwise.

C. THE COURT OF APPEAL'S DECISION IS "IN LINE" WITH THE U.S. SUPREME COURT CASE CITED AND ATTORNEY GENERAL OPINION.

1. *Lucas* Is Not Dispositive of the Submitted Review Issue in SMITH's Favor.

SMITH's "Point II" in his petition is that *Lucas, supra,* supports his claim that there was a temporary taking of a portion of the subject property, despite the Court of Appeal's finding to the contrary. The Court of Appeal did

consider *Lucas* (Opinion, pp. 15, 19) in reaching the conclusion that "the merger did not result in a taking which deprived SMITH of 'all economically beneficial or productive use of land'. . . . " (Opinion, p. 19). The Court relied on the trial court's findings of fact to reject SMITH's argument that he had been deprived of "all economically beneficial or productive use of land." The trial court's findings essentially established or permitted reasonable references that SMITH marketed the property as a whole at all times, acquired the property as a whole, and was not limited through the merger to using his property as a single building site because he could have sought a new subdivision. Further,

> there was *no* finding the City was at all times intending to acquire the SMITH property for park purposes, was intentionally thwarting SMITH's efforts to develop his property or that the City was engaging in any unreasonable delay in initiating condemnation. (Emphasis added.)

(Opinion at 16-20.)

The Court of Appeal thus found that this was not a *Lucas* situation where a construction ban had been enforced which would have deprived Lucas of "*all* economically beneficial uses. . . . " (Emphasis in original.) 112 S.Ct. at 2895.

Supreme Court review is not proper where SMITH seeks only a review of the Court of Appeal's determination on the merits after its own review of the facts. *People v. Davis, supra,* at 349-350.

2. The Other Three Questions Answered in The Attorney General Opinion Are Not Dispositive In SMITH's Favor Of The Submitted Review Issue

The gist of SMITH's first point in his petition for review is that the Court of Appeal should not have confined its discussion to the third question and answer of the Attorney General's opinion in 62 Ops. Cal. Atty. Gen. 281 (1979); SMITH claims that the other three questions and answers supported a decision in SMITH's favor that the merger was invalid and effected a temporary taking while his approximately twenty acres were merged as one lot.

SMITH conveniently quoted only snatches of the Attorney General opinion, and fails to acknowledge that the Court of Appeal discussed the most significant question and answer of the opinion as they pertained to this particular set of facts and circumstances:

> 3. What kinds of parcels, if any, were unmerged by the 1977 amendment of Government Code section 66424.2?
>
> . . . .
>
> 3. No parcels were expressly unmerged by the provisions of the 1977 amendment of Government code section 66424.2.

Id., at 281, 286. The Court of Appeal effectively agreed with the Attorney General that if a parcel had already been merged, as the subject property was in March of 1977, before SMITH acquired it, pursuant to the then-existing Government Code Section 66424.2, the July 1977 amendment would not have automatically unmerged the

parcels. See 62 Ops. Cal. Atty Gen. at 286; Opinion at 13-14.

The Court of Appeal did not ignore the other three questions and answers; they were inapplicable to the considerations required for these facts, with the limited exception of the first question and answer, in the discussion of which the Attorney General recognized the exception applicable to SMITH's property. The Attorney General noted:

> The legislation [the Government Code Section 66424.2 in effect when the merger occurred], however, also provided for an exception to the general nonmerger rule. It established the following limited conditions for the merger of parcels created in compliance with existing subdivision laws and regulations: (1) the parcels must be contiguous, (2) they must be held by the same owner, (3) one of the parcels must not conform to locally established standards for minimum parcel size to permit use or development, (4) one of the parcels must not be developed with a building for which a building permit was issued, and (5) local ordinances must not exempt the parcels from merger.

Id., at 284. The Court of Appeal, on page 10 of its decision, emphasized that same exception to the "general nonmerger rule", and confirmed that DEL MAR had validly filed the notice of merger before the July 1977 amendment consistent with the exception.

Moreover, the Attorney General's discussion concerning the answer to the second question acknowledged that it "restates the first question except that it refers solely to the 1977 amendment of Section 66424.2," and

concluded that "no changes were made that would require a different conclusion." *Id.*, at p. 285. Thus the same exception to the "general nonmerger rule" applied as of the July 1977 amendment.

The Court of Appeal was never required to consider whether the lots were "eligible for use or development pursuant to an existing local ordinance" because that point was moot. The lots had been validly merged.

3. *Nollan* Was Already Considered By The Court of Appeal

SMITH urges that the Supreme Court's language in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 permitted him to be compensated for a temporary taking even though he was not the owner of the property when the alleged taking occurred. The Court of Appeal was clearly aware of the existence of the *Nollan* decision, and used that decision in support of its ruling that no taking had occurred. (Opinion, p. 15.) Again, Supreme Court review should be denied where the petitioner merely seeks a review on the merits. *People v. Davis, supra,* at 349-350.

III. PLAINTIFF'S PETITION WAS NOT TIMELY FILED AND SHOULD THEREFORE BE DENIED

California Rule of Court 45(c) required SMITH to file his petition for review within 10 days of the date the Court of Appeal's decision became final. The Court of Appeal's decision was filed on February 22, 1993, and thus became final under California Rule of Court 24(a) 30

days after filing, or March 24, 1993. SMITH then had 10 days, or until April 3, 1993, to file his petition for review, according to California Rule of Court 28(b). Since April 3 was a Saturday, SMITH was required to file his petition no later than Monday, April 5, 1993. The petition was not filed until April 6, 1993.

Under California Rule of Court 45(c), the time for filing a petition for Supreme Court review of a Court of Appeal decision "shall not be extended." SMITH has therefore failed to timely file his petition for review and DEL MAR respectfully requests that SMITH's petition for review be denied on that ground.

IV. CONCLUSION

For the foregoing reasons, DEL MAR respectfully requests that SMITH's Petition for Review be denied, with sanctions awarded to DEL MAR for frivolous appeal.

DATE: April 26, 1993

McDOUGAL, LOVE, ECKIS & GRINDLE

By:/s/ Lynn R. McDougal
LYNN R. McDOUGAL
Attorneys for Defendant/
Respondent
CITY OF DEL MAR

COURT: **THE SUPREME COURT, STATE OF CALIFORNIA**

CASE NAME: **JAMES E. SMITH, Appellant v. THE CITY OF DEL MAR, Respondent**

CASE NO: **S032104 (CALIFORNIA SUPREME COURT)**
D011536 (FOURTH DCA, Div. One)

PROOF OF FILING AND SERVICE BY MAIL

I, Kathleen McDade, declare that I am over the age of eighteen years and not a party to this action; my business address is 460 North Magnolia Avenue, El Cajon, California 92020; that I served the below named the following documents in the following manner: ANSWER TO PETITION FOR REVIEW and PROOF OF FILING AND SERVICE,

By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and with the postage thereon fully prepaid, either deposited in the United States Postal Service or placed for collection and mailing by me on April 26, 1993, at El Cajon, California, following ordinary business practices.

James E. Smith
2100 Gatun Street
Del Mar, California 92041

Honorable J. Morgan Lester
Superior Court of California
Department A
325 S. Melrose Drive
Vista, CA 92083-6693

The original and thirteen (13) copies were filed with the California Supreme Court by delivery to the Court of Appeal, Fourth Appellate District, Division One, 750 "B" Street, Ste. 500, San Diego, CA 92101.

One (1) copy was personally delivered to the Clerk of the Court of Appeal, Fourth Appellate District, Division One, 750 "B" Street, Ste. 500, San Diego, CA 92101.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26th day of April, 1993, at El Cajon, California.

/s/ Kathleen McDade
Kathleen McDade

APPENDIX D

NO. S032104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Plaintiff and Appellant, vs. The City of Del Mar, Defendant and Respondent.	)	NO. S032104

REPLY TO ANSWER TO PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court
of the State of California, San Diego County
Honorable J. Morgan Lester, Judge

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for Appellant

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OTHER:

California Rule of Court 40(n) 1

COURT: THE SUPREME COURT, STATE OF CALIFORNIA;
CASE NAME: JAMES E. SMITH, APPELLANT VS. THE CITY OF DEL MAR, RESPONDENT;
CASE NO. D011536, (FOURTH DCA, Div. One);
NO. S032104, CALIFORNIA SUPREME COURT.

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, Norma J. Hewitt, declare that I am over the age of eighteen years and not a party to this action; my business address is 5665 Oberlin Drive, Suite 100, San Diego, California 92121; that I filed and served the below named the following documents in the following manner: **REPLY TO ANSWER TO PETITION FOR REVIEW AND PROOF OF FILING (PRIORITY MAIL) AND SERVICE,**

1) ___ By having copies personally served on the below listed person by KNOX ATTORNEY SERVICE.

2) ___ By leaving, during usual office hours, copies in the office the person served with the person who apparently was in charge and thereafter mailing (by first class mail, postage prepaid) copies to the person served at the place where copies were left.

3) ___ By leaving copies at the dwelling house, usual place of abode or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who was informed of the general nature of the papers and thereafter mailing (via first class mail, postage prepaid) copies of the person served at the place where copies were left.

4) XX by placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on May 3, 1993.

California Supreme Court
South Tower – Eighth Floor
303 Second Street
San Francisco, CA 94107
(Original and 13 copies via Priority Mail)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" Street, Suite 500
San Diego, CA 92101
(1 copy)

Lynn R. McDougal, Esq.
McDougal, Love et al,
Attorneys at Law
460 N. Magnolia Ave., Drawer 1466
El Cajon, CA 92022
Attorney for Respondent
(1 copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 3, 1993 at San Diego, California.

/s/ Norma J. Hewitt
Norma J. Hewitt

NO. S032104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith,	)	**NO. S032104**
Plaintiff and Appellant,	)	
vs.	)	
The City of Del Mar,	)	
Defendant and Respondent.	)	

I.

THE PETITION WAS TIMELY FILED

California Rule of Court 40(n) proves:

> (n) "Date of filing" of a brief (as defined in subdivision (k) is [1] the date of delivery to the clerk's office during normal business hours [2]. **The brief is timely, however, if the time for its filing had not expired** on the date of **its** mailing

> by certified [3] or express mail as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

The April 1, 1993 Proof of Filing and Service by Mail as well as the post mark clearly show that the mailing by U.S. Post Office Priority Mail was five days prior to the filing deadline of April 5, 1993.

II.

LUCAS IS DISPOSITIVE OF THE TAKING ISSUE

Lucas v. South Carolina Coastal Council (1992) ___ U.S. ___, 112 S. Ct. 2886 has set a standard for the phraseology "all economically beneficial or productive use" which is not exclusively restricted to the literal definition of the word 'all'. In other words, this Honorable California Supreme Court is called upon to determine, in light of the U.S. Supreme Court's decision in *Lucas*, what exactly does the phraseology "all economically beneficial or productive use" mean and how that meaning applies to the effected landowners of California.

In light of the *Lucas* decision, the determination as to what constitutes "all economically beneficial or productive use" of land in California is a highly significant and important question of law. This determination will ensure that uniformity of decisions in this State will occur in the future with regard to the 'taking' issue.

Appellant herein is not requesting that the review of this case by the Supreme Court involve consideration of an issue or fact that was omitted from the Opinion of the 4th District Court of Appeal. Appellant instead submits

that the opinion of the Court of Appeal is contrary to existing law.

The Court of Appeal opines as follows:

> "We also conclude the merger did not result in a taking which deprived Smith of "all economically beneficial or productive use of land", [citation], since there was economically beneficial and productive use in using or conveying the Snakewall property as a whole and the merger did not prevent Smith from seeking to subdivide the property." (Opinion pp. 19-22).

Lucas makes it clear that being able to convey or alienate the subject property does not negate that 'all economically beneficial or productive use' was taken. *Lucas* clearly could have sold or alienated his property.

The question then becomes what did the Court of Appeal mean when it opined that Smith did not have "all economically beneficial and productive use of his land" taken since there was economically beneficial and productive use in 'using' the property? (Opinion p. 20). Again, from *Lucas* we see many types of uses to which *Lucas* could have put his property, however, this did not prevent his 'taking' claim from being sustained. Similarly, Appellant indeed could have camped on his property, used it recreationally in a variety of ways, and generally just used it for personal purposes. This use, however, does not defeat a 'taking' claim according to *Lucas*.

Facts *are not* the issue as Respondent alleges. "Settlement of important questions of law" for all of the effected landowners of California is needed by this Honorable Court. *People v. Davis* (1905) 147 Cal. 346, 350.

Therefore, *Lucas* was misinterpreted by the Court of Appeal. A correct interpretation would have resulted in a favorable decision for Appellant.

III.

A REVIEW OF *NOLLAN* WOULD NOT BE A REVIEW ON THE MERITS

Appellant submits that *Nollan,* infra, being a U.S. Supreme Court Case, would control with regard to the issue of whether or not a land owner or his predecessor in interest had the right to assert a taking claim. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, at 834, Fn.2. In support of their opinion, p. 17, the Court of Appeal cites *City of Los Angeles v. Richards* (1973) 10 Cal. 3d 385, 388-389 for the proposition that Appellant cannot raise the 'taking' claim as it occurred just prior to Appellant acquiring the property from his predecessor.

There is no indication whatsoever that the Court of appeal considered *Nollan* in this context.

IV.

CONCLUSION

Appellant submits that this case is one which is ripe for review by this Court for the reason that there is currently no decisional law in California regarding 'taking' by the government in light of the recent U.S. Supreme Court decision in *Lucas.*

This case presently before the bar contains all the elements of a *Lucas* 'taking' case. The Appeal Court did

not follow the holding in *Lucas* as evidenced not only by their opinion, but also as evidenced by the contradictions plainly visible from only a cursory comparison of their Opinion and *Lucas*.

For the reasons set forth in this Reply, as well as the Petition, this court should grant this Petition for Review.

Respectfully submitted,

/s/ James E. Smith
James E. Smith
Propria Persona

Dated: May 3, 1993

APPENDIX E

NOT TO BE PUBLISHED IN OFFICIAL REPORT

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. SMITH, Plaintiff and Appellant, v. CITY OF DEL MAR, Defendant and Respondent.	)	D011536 (Super. Ct. No. N38218)

(Filed Feb. 22, 1993)

APPEAL from a judgment of the Superior Court of San Diego County, J. Morgan Lester, Judge. Affirmed.

James E. Smith owned property in Del Mar (hereafter the City) known as the Snakewall property of La Atalaya. From the time he bought the property until 1985, the property was merged into one parcel for the purposes of the Subdivision Map Act (Gov. Code,[1] § 66410 et seq.). On appeal, Smith contends the court erred in ruling against him on his causes of action for inverse condemnation based on the City's actions in merging the property, restrictively zoning the property and in failing to tell a private organization he owned 20 building sites. We affirm.

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[1] All statutory references are to the Government Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Notice of Merger and Zoning

The Snakewall property consists of approximately 20 acres of land, primarily undeveloped, in the City of Del Mar. The property was originally subdivided into 20 lots during 1910-1913. In 1975, the City zoned the property R1-40, very low density residential, allowing one dwelling per acre. Fourteen of the lots in the original Snakewall subdivision did not meet the R1-40 minimum lot size requirement. The City also imposed open space as well as bluff, slope and canyon overlay zones which, inter alia, required residences to be one-story wood structures. These overlay zones required discretionary review and approval for any development.

In early 1977, after notice to the then owner of the Snakewall property and public hearings, the City filed a notice of merger, merging the 20 lots of the Snakewall property into one lot under section 66424.2[2] based on the existence of contiguous, undeveloped lots which failed to meet the minimum lot size and which were under common ownership.[3] The City filed a notice of merger in March 1977.

In September 1977, the City passed a zoning ordinance which provided:

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[2] The statutory scheme for merging property is now set forth in sections 66451.10 to 66451.21.

[3] There is some confusion between the parties as to whether the merger resulted in a merger of 18 or 20 lots and whether it thus created one or two lots. For the purposes of this opinion, we treat the merger as creating one lot or building site.

> "Two or more contiguous parcels or units of land which have been subdivided under the provisions of the Subdivision Map Act, or any prior law regulating the division of land or local ordinance enacted pursuant thereto, shall not merge by virtue of the fact that such contiguous parcels or units are held by the same owner; except that, if any one of such contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size, including width, depth, or area to permit use or development under this Chapter, and at least one of such contiguous parcels or units is not, or has not within the previous year, been developed with a building for which a permit has been issued, then such parcels shall be merged."

In December 1977, Smith purchased the Snakewall property for over $800,000.

In 1981, Smith and City officials began discussing a possible sale of the Snakewall property to the City. The first appraiser, agreed upon by the City and Smith, valued the property at $1.75 million. Smith then hired another appraiser who valued the property at $4 million. There was some discussion between Smith and the City about using the alternative of condemnation in case it would help Smith with his tax situation. Smith eventually offered the property to Del Mar for approximately $5.5 million. The City declined the offer.

On July 23, 1982, Smith wrote the City, threatening to sue unless the City within 30 days forwarded to him "written formal notice . . . that it has recinded, [sic], and made null & void, that certain prior formal down zoning

of the above referenced property, whereby no development could be made of this property as per existing zoning, R1-40000 which is of record. Be advised this prior action has clouded my title since inception to now. . . . I demand its revocation in its entirety." (Emphasis deleted.) In a subsequent letter on August 19, 1982, Smith clarified it was the notice of merger which he believed was clouding his title.

The City Attorney wrote to Smith on September 16, 1982, telling him the City had been "compelled" to record the notice of merger by state law and that "[t]here is simply no way that the City can now go back in time more than five years and 'undo' that which it was compelled to do by State Law." The City Attorney also noted:

> "I have briefly reviewed this matter with our City Planning Director, Bill Healy, who advises me that [the Snakewall property] appears to be subdividable under current City regulations. Thus, to the extent that subdivision can contribute to the value of your property, it can take place today. Even if the property had never been merged, resubdivision would have been virtually inevitable to convert the unusable lots to usable lots. Either way, the process and result would be substantially similar. For these reasons, the merger appears to have only relatively insignificant impacts on your property."

In 1983, Smith became interested in building a hotel/resort on the property. In 1986, Smith placed the resort development proposal before the voters in Del Mar. His proposal was defeated with the voters who indicated a preference for 20 single family homes on the property.

On October 9, 1985, at Smith's request, the City released the notice of merger.

Del Mar Civic Association

The Del Mar Civic Association was a nonprofit association created for the purpose of holding a strip of beachfront property for the benefit of the community. Smith joined the Association in March 1985. Voting rights in the association were determined by the number of building sites owned by the member. The City gave the Association an informal opinion that Smith had one lot and thus one vote. A City staff member also released a September 16, 1982 letter from the City Attorney to Smith which stated the property could not be unmerged. When the Association asked the City for a formal opinion as to whether Smith was entitled to 1 or 20 votes, the City refused to give a formal opinion. The Association granted Smith one vote.

On May 7, 1985, the Association voted to transfer the beachfront property to the City and then to dissolve. The vote was 63 to 22 in favor of transferring the beachfront property to the City and 63 to 19 in favor of dissolving. The bylaws of the Association required a two-thirds majority vote to amend the bylaws so the beachfront property could be transferred to the City. The bylaws also provided that upon dissolution each member was entitled to his proportionate share of any real or personal property owned by the Association.

Smith sued the City in September 1987, originally seeking declaratory relief as to the notice of merger and dispute over the number of votes he was entitled to in the

Del Mar Civic Association. Smith eventually amended his complaint to seek inverse condemnation damages based on the imposition of the notice of merger, the zoning of his property and the City's failure to inform the Del Mar Civic Association he was entitled to 20 votes.

The court granted the City's Code of Civil Procedure section 631.8 motion following the presentation of evidence by Smith on Smith's causes of action relating to the zoning and Del Mar Civic Association. As to the cause of action based on the notice of merger, the court found that as a matter of law there was no taking and therefore Smith was not entitled to any damages.

DISCUSSION

I

Standard of Review

Review of a judgment granted under Code of Civil Procedure section 631.8 "is normally conducted under the substantial evidence standard, viewing the evidence most favorably to respondents. [Citation.]" (*Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 317.) Under the substantial evidence rule, all the evidence most favorable to the respondent must be accepted as true and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. (*Estate of Teel* (1944) 25 Cal.2d 520, 527.) The appellate court does not judge the effect or value of the evidence, weigh the evidence, consider the credibility of witnesses or resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. (*Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1125.)

When the issue before the trial court involved a matter of law, we are not bound by the trial court's interpretation and are free to draw our own interpretations of the law. (*Torrey Pines Bank v. Hoffman, supra,* 231 Cal.App.3d 308, 317; *Palm v. Schilling* (1988) 199 Cal.App.3d 63, 67.)

II

The Merger is Valid

Smith contends the imposition of the merger on the Snakewall property was wrongfully imposed and retained on the property and he is entitled to damages for a temporary taking from the time he bought the property in 1977 or requested the release of the merger in 1982 until the time the City released the merger in 1985.

Recovery in inverse condemnation is based on the constitutional provision requiring just compensation when the government takes or damages private property. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 656, fn. 8.) The United States Supreme Court has described two categories of regulatory action which require compensation.

> "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

> "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. [Citations.] As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' [Citation.]" (*Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___ [112 S.Ct. 2886, 2893-2894].)

Before the Supreme Court's decision in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, a California landowner who claimed a land use regulation was excessive could only seek invalidation of the regulation; the landowner could not seek compensation for any temporary taking occurring between the time the excessive regulation was enacted and the time it was declared invalid. (See *Agins v. City of Tiburon* (1979) 24 Cal.3d 266.) In *First Lutheran*, the Supreme Court held the constitution requires payment of just compensation even when the government only temporarily takes private property. (*First Lutheran Church v. Los Angeles County, supra,* 482 U.S. 304, 321; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1496.)

Smith contends the merger was an invalid regulation which "[u]nquestionably . . . denied [him] the right to sell, lease, transfer, assign or convey his interest in 18 of the 20 lots. . . . " His claim the merger was invalid rests on his interpretation of section 66424.2 which governed mergers of property during the relevant time period.

In construing a statute, the task of the court is to determine and give effect to the Legislature's intent.

(*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1095; *People v. Freeman* (1988) 46 Cal.3d 419, 425, cert. den. (1989) 489 U.S. 1017.) The court begins with the language used. (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91.) The court attempts to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage. (*Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 607; *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 218.) "The words must be construed in context in light of the nature and obvious purpose of the statute where they appear. [Citation.]" (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 354.) The statute "must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the Legislature, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. [Citations.]" (*Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 902.)

Generally, a substantial change in the language of a statute by an amendment indicates the Legislature's intention to change the meaning of a statute. (*Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 400.) The surrounding circumstances, however, may indicate the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute. (*Nationwide Investment Corp. v. California Funeral Service, Inc.* (1974) 40 Cal.App.3d 494, 501.)

In 1977, at the time the City recorded the notice of merger, section 66424.2 provided:

"Notwithstanding Section 66424, two or more contiguous parcels or units of land which have been subdivided under the provisions of this division or any prior law regulating the division of land or a local ordinance enacted pursuant thereto shall not merge by virtue of the fact that such contiguous parcels or units are held by the same owner and no further proceeding under the provisions of this division or a local ordinance enacted pursuant thereto shall be required for the purpose of sale, lease or financing of such contiguous parcels or units, or any of them; *except that, if any one of such contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size to permit use or development under a zoning, subdivision or other ordinance of the local agency and at least one of such contiguous parcels or units is not developed with a building for which a permit has been issued by the local agency, then such parcels shall be merged for the purposes of this division* (unless a local ordinance specifically exempts such parcels from merger in such circumstances).

"Whenever a local agency has knowledge that real property has merged pursuant to this section or a local ordinance enacted pursuant to this division, it shall cause to be filed for record with the recorder of the county in which the real property is located, a notice of such merger specifying the names of the record owners and particularly describing the real property, provided that, at least 30 days prior to the recording of the notice the owner of the parcels or units to be affected by the merger, shall be advised in writing of the intention to record the notice and specifying a time, date and place at

> which the owner may present evidence to the legislative body or advisory agency why such notice should not be recorded." (Stats. 1976, ch. 928, § 4, p. 2120, emphasis added.)

When the City filed the notice of merger in 1977, the conditions for merging the Snakewall property units under section 66424.2 existed: the units were contiguous, under common ownership and the majority of lots were both below the minimum lot size for development and were in an undeveloped state. The City duly complied with the notice and hearing requirements before it filed the notice of merger.

In 1977, the Legislature amended section 66424.2 to provide contiguous parcels or units of land did not merge by virtue of common ownership,

> "except that, *a local agency may, by ordinance,* provide that if any one of such contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size to permit use or development under a zoning, subdivision or other ordinance of the local agency and at least one of such contiguous parcels or units is not developed with a building for which a permit has been issued by the local agency, or which was built prior to the time such permits were required by the local agency then *such parcels shall be merged for the purposes of this division.*
>
> *"A local agency may, by ordinance, deem any or all parcels or units of land which merged prior to the effective date of the 1977 amendments to this section, unmerged and separate parcels.*

> "Whenever a local agency has knowledge that real property has merged pursuant to this section or a local ordinance enacted pursuant to this section, it shall cause to be filed for record with the recorder of the county in which the real property is located, a notice of such merger. . . ." (Stats. 1977, ch. 234, § 5, pp. 1034-1035, emphasis added.)

This amendment became effective in July 1977. The City passed an ordinance providing for merger of substandard residential lots in September 1977. (City of Del Mar Ord. No. 276, § 30-6.9.) Smith argues under the 1977 amendment, the City was required to have an enabling ordinance before it could merge property. He contends since the City's "enabling ordinance" became effective several months after the notice of merger on the Snakewall property was recorded, the City failed to comply with the amended section 66424.2 and the lots were deemed unmerged.

Smith's interpretation is not supported by the language of the statute. Nowhere in the amended statute does it state parcels previously merged become unmerged unless the local agency enacts an ordinance and files a new notice of merger. Indeed, a contrary intent is shown by the Legislature's statement that local agencies, "may, by ordinance, deem any or all parcels or units of land which merged prior to the effective date of the 1977 amendments to this section, unmerged and separate parcels." (Stats. 1977, Ch. 234, § 5, p. 1034.) There would have been no need for this language if the Legislature had intended, as Smith contends, that parcels automatically became unmerged by virtue of the 1977 amendment

and stayed unmerged unless the City enacted an ordinance and then filed a new notice of merger. Smith's interpretation renders statutory language to be mere surplusage, a result to be avoided. (*Fontana Unified School Dist. v. Burman, supra,* 45 Cal.3d 208, 218.)

We also note Smith's interpretation violates the general rule that legislation operate prospectively unless there is a clear intent for retroactive application. (See *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393.) Under Smith's interpretation, the 1977 amendment was intended to have a retroactive effect, i.e., to undo mergers that were valid under prior law. The amendment, however, reveals no such retroactive language. Instead, as pointed out above, the legislative intent appears to have been to continue mergers effective under the previous statute while making clear the local agency had the power to unmerge such property by ordinance.

Our interpretation that the Legislature did not intend the 1977 amendment to unmerge property which had been merged under the prior law is consistent with an Attorney General opinion. As Smith points out in his brief, opinions of the Attorney General are not binding on the courts but they may be accorded " 'great weight.' " (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 954.) The Attorney General was asked "What kinds of parcels, if any, were unmerged by the 1977 amendment of Government Code section 66424.2?" (62 Ops.Cal.Atty. Gen. 281 (1979).) The Attorney General concluded "no parcels were unmerged by the amendment." (*Id.* at p. 286.) The Attorney General explained:

> "As previously mentioned, the 1977 amendment continued the general language of the enactment concerning when parcels did not merge for purposes of the Act. It also provided additional circumstances under which merger would not occur for purposes of the Act. We do not view these general provisions as a change in the statutory scheme so as to cause the unmerging of previously merged parcels. Instead, the plain language of the statutory amendment indicates only a legislative intent to clarify existing law and to shift complete control over the merger of substandard parcels to the local agencies." (*Id.* at p. 286.)

Smith's interpretation is also belied by the subsequent history of section 66424.2. In 1980, the Legislature enacted an amendment to section 66424.2 to provide:

> "(b) *Any parcels which merged by operation of law prior to the enactment of a local ordinance* adopted pursuant to the provisions of subdivision (a) *are hereby deemed to be unmerged* without compliance with the requirements of this division." (Stats. 1980, ch. 403, § 2, p. 789, emphasis added.)

This amendment supports Smith's view, i.e., that parcels merged by operation of law are unmerged and can be remerged only if the local agency adopts an ordinance and then files a notice of merger. This amendment, however, did not go into effect. Instead, the Legislature, in urgency legislation, enacted a subdivision (b) to section 66424.2 which provided:

> "(b) *Any parcels which merged by operation of law and which have not been deemed merged pursuant to a local ordinance* adopted pursuant to subdivision (a), *are hereby deemed to be unmerged* without

compliance with the requirements of this division." (Stats. 1980, ch. 1217, § 3, p. 4127, emphasis added.)

This 1980 legislation makes it absolutely explicit that the Legislature intended the unmerger of parcels which were merged by the original 1977 law only when there was no local ordinance providing for merger. The urgency legislation rejected the interpretation urged by Smith, i.e., that parcels merged by virtue of the original 1977 version of section 66424.2 before a local ordinance was enacted became automatically unmerged.

We conclude the Snakewall property was properly merged pursuant to section 66424.2 and Smith was not entitled to any damages based upon the merger and notice of merger filed on his property.

III

No Taking Occurred

Even if we were to agree with Smith that the merger of the Snakewall property lots was unlawful, we would not reverse because the merger did not effect a taking.

It has long been recognized "that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and 'does not den[y] an owner economically viable use of his land.' [Citations.]" (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 834.) Here, contrary to Smith's assertion, the merger did not deny him "all economically beneficial or productive use of land." (*Lucas v. South Carolina Coastal Council, supra,*

___ U.S. ___ [112 S.Ct. 2886, 2893]; see also *Nollan v. California Coastal Commission, supra,* 483 U.S. 825, 834.)

As the trial court found, Smith retained the right to use and enjoy the estate as a single piece of property and to sell the Snakewall as a single property. Indeed, from the time he bought the property until 1985, Smith's attempts to sell or develop the property were directed to selling the property as a whole. Payment of compensation is based on the premise there was a temporary deprivation by an excessive regulation. Since Smith was not trying to develop or sell the lots of the old subdivision, but only trying to sell the property as a whole it can not be said the merger resulted in temporarily taking a property interest from Smith. (See *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385.)

Smith argues the trial court erred in focusing on his enjoyment and use of the property as a whole. He quotes *People ex rel. Dept. of Transportation v. Gardella Square* (1988) 200 Cal.App.3d 559, 571, where the court stated:

> "The concept of 'taking' has evolved from the notion of a physical seizure to that of a diminution of the owner's rights and attributes of ownership. Accordingly, the rule has developed that a cause of action for inverse condemnation arises from a governmental invasion or appropriation of a valuable property right which directly and specifically affects the landowner to his injury. [Citations.]"

Based on this language, Smith argues the merger "appropriated a valuable property right," i.e., his right to separately develop and convey all 20 lots of the 1910-1913 subdivision. Smith, however, ignores the fact that the

Snakewall property he acquired in December 1977 was a merged property; he did not acquire 20 lots, but only one. If anyone was entitled to compensation for a "taking" of the individual lots due to the filing of the notice of merger, it was the previous owner who suffered the diminution in value, not Smith who purchased the property after the diminution had occurred and presumably paid a lesser amount for the property as a result of the merger being imposed. (See *City of Los Angeles v. Ricards, supra,* 10 Cal.3d 385, 388-389, the right to compensation for a taking or damaging resulting in depreciating the value of the property "remains in the person who owned the property at the time of the taking or damaging, regardless of whether the property is subsequently transferred to another person. [Citations.]".)

Smith also relies on *Taper v. City of Long Beach* (1982) 129 Cal.App.3d 590, claiming it is a case which "is directly on point." In *Taper,* the landowner sued for damages for unreasonable delay in pursuing condemnation of the property for a city park. Smith points to the court's statements:

> " 'The conduct of the City of Long Beach has caused the owners of the Taper property to be denied all use and enjoyment of said property and the right to sell, develop or improve it.'
>
> " .....
>
> " . . . In the case at bench the trial court found on substantial evidence, as previously observed, that City intended to acquire the property for a public park, would not permit any development of it, and completely deprived the Tapers of the right to use or develop the property for an

> unreasonable period of time. There can be no question but that City's actions 'directly and specially affect[ed]' the Tapers' to their injury. [Citations.]" (*Taper v. City of Long Beach, supra,* 129 Cal.App.3d 590, 603, 615.)

Smith argues his situation was similar since there were people trespassing on his property, using it as a de facto public park and the City indicated interested [sic] in acquiring the property for a park.[4] While in both this case and *Taper,* the City indicated interested [sic] in purchasing private property for a park, there the similarity ends. In *Taper,* the trial court found " '[t]he City at all times intended to acquire the Taper property for park purposes,' " acquired funds to finance the purchase, adopted a position " 'that in no way would the City allow Taper to develop his property due to the great public pressure for acquisition' " for park purposes, and unreasonably delayed in commencing condemnation proceedings.

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[4] Smith in his briefs states "residents of DEL MAR had climbed the walls and used the property as a de facto park" and that "DEL MAR at no point in time prevented its residents from routinely trespassing on the Snakewall property." Smith states "this trespassing became such a problem that [he] was forced to hire his own private security patrol for the property. [Citation.] SMITH was simply forced to take action to exclude others from his property as DEL MAR clearly did not." The fact Smith may have had a problem with trespassers on his undeveloped property and that Del Mar residents used his private property for park-like purposes, does not mean the City must pay damages for the use of Smith's property as a public park. Nothing in the record shows the use of Smith's property was part of a scheme authorized by Del Mar officials. The record tends to show these were private individuals trespassing on private land. The exclusion of such trespassers from private property rests primarily with the landowner, not the City.

(*Taper v. City of Long Beach, supra,* 129 Cal.App.3d 590, 602-603.) Here, in contrast, while there were some negotiations between Smith and the City to buy the property and some discussion of condemnation as an alternative in case it would help Smith with his tax situation, there was no finding the City was at all times intending to acquire the Smith property for park purposes, was intentionally thwarting Smith's efforts to develop his property or that the City was engaging in any unreasonable delay in initiating condemnation. The court, upon substantial evidence, found Smith was marketing the property as a whole to various individuals or seeking to develop the property as a whole; the court implicitly rejected a finding the City somehow effected a damaging or taking by a plan to acquire Smith's property for a park or by delaying condemnation. The *Taper* case is not, as Smith contends, "directly on point" and it does not support reversal of the judgment here.

We further note the City's filing of the notice of merger did not limit Smith to using his property only as a single building site. The merger only eliminated the 1910-1913 subdivision with its substandard lots; it did not prevent him from obtaining a new subdivision. Contrary to Smith's contention, the notice of merger did not take any property right to sell individual lots; it only required him to submit a new subdivision plan.

In sum, we conclude the Snakewall property was properly merged pursuant to section 66424.2. We also conclude the merger did not result in a taking which deprived Smith of "all economically beneficial or productive use of land" (*Lucas v. South Carolina Coastal Council, supra,* ___ U.S. ___ [112 S.Ct. 2886, 2893]), since there was

economically beneficial and productive use in using or conveying the Snakewall property as a whole and the merger did not prevent Smith from seeking to subdivide the property.

IV

Zoning of Property

Smith contends the zoning of the property as low-density residential with its overlay zoning of bluff, slope and canyon and open space effected a taking of his property requiring payment of compensation. Smith contends his cause of action for inverse condemnation was "based on the zoning designations is primarily a facial attack on their imposition by DEL MAR."

A zoning restriction is facially invalid if (1) it does not substantially advance legitimate state interests, or (2) it denies an owner economically viable use of his land. (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.)

Smith concedes "a change in zoning which results in a reduction of a property's value does not constitute a taking" but argues "under the specific circumstances of this case and in light of the invalidly maintained notice of merger, . . . the R140 zoning, the bluff slope and canyon and open space overlay zones constitute a taking of [his] property interests." The trial court found the regulatory actions taken by the City did not constitute a taking.

Smith essentially claims there was no substantial evidence to support a conclusion the zoning was supported by a legitimate state interest. To support his argument, Smith cites the testimony of a Del Mar architect as

"clearly prov[ing] that these zoning restrictions and overlay zones caused the most damage to the environment by necessitating the largest building pad which results in a greater amount of grading and destruction of torrey pine trees, etc."

At the cited pages, the witness did not testify generally about the destruction caused by the R1-40 zoning requiring single-story wood houses "necessitating the largest building pad," rather the witness testified that one person (Mr. McPherson) killed two torrey pine trees and did a lot of grading when developing his Snakewall lot. Other evidence in the record indicated the McPherson lot was perhaps an atypical lot since it was the smallest lot in the Snakewall property. The witness explained that "[t]he more grading that is done, I think the less sensitive it will be to the environment." The witness rejected the need to cluster the development of the Snakewall property and opined the sandstone bluffs not be developed. In other words, the witness's cited testimony focused on environmental damage done on the smallest, possibly atypical, lot on the Snakewall property and advocated even more restrictions on development of the Snakewall property than existed under the current zoning. The testimony does not tend to support a conclusion the zoning did not further legitimate state interests or denied Smith economically viable use of his property.

Smith cites evidence indicating "a member of DEL MAR's Planning Commission stated at a public hearing that the nonconforming Snakewall lots taste, smell and look like the neighboring R1-10 lots and deserve like treatment." Smith, however, does not cite to any testimony by this planning commissioner nor to any record of

a public hearing, but to the argument of his counsel. Arguments of counsel are not evidence. (See 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 283, p. 286; BAJI No. 1.02.)

Smith also cites evidence "there is a vacant lot adjoining the Snakewall property owned by a third party which is a conforming R1-10 lot of the same topography as the adjacent nonconforming R1-40 Snakewall lots" to support his argument the Snakewall property should not have been zoned R1-40 but R1-10.

The fact that one lot in an R1-10 zone is similar to lots in the Snakewall property does not tend to show the zoning of the Snakewall property as a whole was either improper regulation not furthering a legitimate state interest or denied Smith economically viable use of the land. Nor does it tend to show the Snakewall zoning is improper "spot-zoning" as Smith contends. For the proposition the Snakewall zoning was improper "spot-zoning," Smith argues "[a] recent decision directly on point by this court is *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954[, 959-960]."

In *Ross,* the court in the Third Division of the Fourth District stated:

> "While every intendment favors the constitutionality of local land use restrictions [citations], they cannot be arbitrary and discriminatory. [Citations.]
>
> "A blatant example of discriminatory land use legislation is 'spot zoning.' Spot zoning is '[w]here a small parcel is restricted and given less rights than the surrounding property. . . . '

> [Citation.] As the court said in *Reynolds v. Barrett, supra,* 12 Cal.2d at page 251, 'It is obvious that by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land.' " (*Ross v. City of Yorba Linda, supra,* 1 Cal.App.4th 954, 959-960.)

In *Ross,* the City of Yorba Linda restricted one lot in a residential zone to a requirement of one residence per acre. The zoning was thus imposed on a very small parcel. Here, in contrast, the R1-40 zoning was imposed on a 20-acre parcel which Smith describes in his brief as "the largest piece of undeveloped property in DEL MAR." This is a significant difference; Smith's situation does not involve spot-zoning of a small parcel.

We further note there was other evidence indicating the R1-10 and R1-40 zones were different because at the time the R1-40 zoning was applied all but one of the R1-10 lots had been developed while the R1-40 zone was undeveloped. Further, the rezoning of the Snakewall property was justified by the substandard nature of some of the lots. As the trial court noted in its statement of decision:

> "As to unsuitability of the original 1913 subdivision, it must also be noted that the original subdivision had one lot, B, which was approximately 240 feet long and twenty feet wide. Other than possible use for a railway siding, the lot was simply undevelopable in realistic terms. Other infirmities plagued the aged subdivision such as the vacation of most of the interior access means. . . . "

Smith has not cited any evidence in the record to support his assertion the zoning of the Snakewall property fails to further the legitimate state interests described in the community plan[5] such as preserving views, preserving the open space appearance of the area from a distance, protecting steep slopes, and harmonizing construction and landscaping with the natural as well as the man-made environment. Nor has Smith presented any evidence tending to show the zoning results in denying him economically viable use of his land. The zoning does not prevent him from developing or selling the land.

Smith asserts the zoning of the property in 1975 to low-density residential with its overlay zoning "was a necessary prerequisite for the merger as it created nonconforming lots at the Snakewall property" and that the combined effect of the zoning and merger "led to the destruction of SMITH'S ability to sell, lease or finance the individual lots making up the Snakewall property." The premise of this argument is that there were no valid reasons to support the 1975 zoning of the property other than as a means to obtaining the end of merging Smith's property. This argument, however, is not supported by the record. As discussed previously, there were other valid reasons for the zoning imposed on the property.

---

[5] The Community Plan criteria for developing the Snakewall property included: preserving steep slopes and vegetation, preserving open character of the site when viewed from the west, north and east, restricting development to the least sensitive portions of the site and protecting views from the top of the site.

Smith contends the notice of merger destroyed his statutory vested right to the original subdivisions "A fundamental vested right has been termed a right 'already possessed' or 'legitimately acquired' [citation]." (*Barrie v. California Coastal Commission* (1987) 196 Cal.App.3d 8, 14.)

> "The vested rights rule is predicated upon an estoppel of the governing body and protects property owners from changes in zoning or other land use regulations which occur before the completion of the owner's project. [Citations.] A vested right to complete a project arises only after the property owner has performed substantial work, incurred substantial liabilities, and has shown good faith reliance upon a governmental permit. [Citation.]" (*South Central Coast Regional Com. v. Charles A. Pratt Construction Co.* (1982) 128 Cal.App.3d 830, 841-842.)

Here, the vested right doctrine does not apply to Smith. First, when Smith bought the property, the notice of merger and R1-40 zoning was in effect and therefore he did not acquire a "right" to a subdivided property with some other zoning. Second, Smith did not perform any substantial work or incur any substantial liability in good faith reliance upon the 1910-1913 subdivision or the pre-1975 zoning. During the time frame involved, Smith used or attempted to sell the property as a whole and he never completed an application to change the zoning on the property.[6]

---

[6] We note there was some evidence in the record indicating Smith submitted an application for a rezoning and that a former

In sum, we reject Smith's arguments the R1-40 zoning on the Snakewall property did not substantially advance legitimate state interest or deprive him of all economically viable use of his land or a vested interest.[7]

V

Del Mar Civic Association

Smith contends the City had a duty to inform the Del Mar Civic Association in 1985 before the notice of merger was lifted that he owned 20 building sites and therefore was entitled to 20 votes. Smith contends the City "wrongfully interfered with [his] proportionate property interest in the [Del Mar Civic Association's] beachfront property" and he thereby suffered damages. We find no merit to

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mayor of the City believed the application was complete. This application was not signed. The evidence presented by Smith was apparently rejected by the court who found Smith had failed to exhaust his administrative remedies.

[7] The City argues Smith in attacking the zoning applied to the Snakewall property has failed to fairly state the evidence and therefore waived any contention the findings are not supported by substantial evidence. (See *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.) The City's argument has merit. Throughout his brief, Smith cites only the evidence most favorable to his position. The record here is substantial, containing six volumes of clerk's transcripts and over twenty volumes of reporter's transcript as well as numerous exhibits. We also note the briefs of both Smith and the City contain numerous erroneous citations to the record. We agree with the City that a legitimate alternate ground for rejecting Smith's claims the R1-40 zoning did not substantially advance a legitimate interest and that he applied for a rezoning is his failure to fully and fairly set out the evidence.

this contention. Even assuming liability could be imposed on a city for misinforming or failing to inform a private organization as to how many building sites are owned by a resident, here there was no misinformation; at the time the information was sought, pursuant to the properly imposed notice of merger, Smith did not own 20 building sites and was not entitled to 20 votes.

DISPOSITION

The judgment is affirmed.

/s/ Kremer
KRAMER, P.J.

WE CONCUR:

/S/ Wiener
WIENER, J.

/S/ Huffman
HUFFMAN, J.

APPENDIX F

IN THE COURT OF APPEAL FOURTH
APPELLATE DISTRICT
FOR THE COUNTY OF SAN DIEGO

JAMES E. SMITH, Petitioner,	)	
v.	)	Case No. D-011536
CITY OF DEL MAR, Respondent.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DANIEL KREMER
HOWARD WIENER AND RICHARD HUFFMAN
APPELLATE COURT JUSTICES

San Diego, California
Tuesday, February 9, 1993

Transcriber:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 2] SAN DIEGO, CALIFORNIA TUESDAY, FEBRUARY 9, 1993

MR. ZAJAC: May it please the Court, good morning, your Honor. My name is Robert Zajac. I'm with the law firm of Hillyer & Irwin, and we represent the appellant, James E. Smith in *Smith v. City of Del Mar.*

Very briefly, your Honors, this case was tried before Judge Lester, bench trialed, between May 24, 1989 through July 28, 1989. It was interrupted by Judge Lester's two-week military reserve duty, and it was also interrupted by several short criminal trials that were sent to Judge Lester during the time period we were in trial.

Nevertheless, at the close of Plaintiff's case, the Court granted the City of Del Mar's motion for judgment pursuant to Code of Civil Procedure 631.8 as to Mr. Smith's second cause of action, which claimed inverse

condemnation based on the zoning, and the third cause of action, which claimed inverse condemnation and sought declaratory relief with regard to the alleged interference by Del Mar in Mr. Smith's property rights in the Del Mar Civic Association.

Finally, after hearing the evidence of both sides, the Court found in favor of the city of Del Mar and Mr. Smith's first cause of action, which alleged inverse condemnation based on the recordation and maintenance of the notice of merger.

After reviewing the briefs and looking at the exhibits and the transcript, I would like to focus my argument here today on the first cause of action. And I believe the best way to clarify and illuminate the issues with regard to that first cause [p. 3] of action is to set forth the sequence of events.

Though the briefs discuss many of these events, I don't think they're put in particularly good time order, and as such, I would like to just briefly discuss the issues, based on the sequence of events.

APPELLATE JUDGE: I think in 1975 they subdivided in, what, 1910, 1913 or something?

MR. ZAJAC: Exactly, your Honor.

APPELLATE JUDGE: In 1975 they did the overlay and the down zoning. Twice in '77 we have a notice of merger and then an ordinance, and then Mr. Smith buys it. If you want to fill in those blanks, go ahead.

MR. ZAJAC: Well, your Honor, that's exactly the case. The property was merged pursuant to the original statute. The language which said that these parcels

merged by operation of law. And subsequently, Mr. Smith purchased the property on December 9, 1977.

APPELLATE JUDGE: There was an ordinance, too, before that, wasn't there?

MR. ZAJAC: There was an ordinance, too, before that. Exactly, your Honor. But the ordinance arose after the property had been merged by operation of the law.

We feel the key –

APPELLATE JUDGE: Don't suspend yourself.

MR. ZAJAC: Yes, your Honor.

The statute which is critical to this entire situation is the statute which came into effect in September of 1980. And that statute sets forth a new Subdivision B. That subparagraph [p. 4] reads, "Any parcels which merge by operation of the law and which have not been deemed merged pursuant to a local ordinance adopted pursuant to Subdivision A, I hereby deem to be unmerged without compliance with the requirements of this division."

Now, since the state law property had merged pursuant to the operation of the law language it is our contention that Del Mar, after this statute came into effect in September 1980, would have had to – the property was deemed unmerged unless Del Mar complied with their subsequently enacted local ordinance, which came into effect only after the parcels were originally merged.

Now, after that, the City and Mr. Smith engaged in negotiations regarding possible purchase. A key exhibit in the entire case is Exhibit 183. This is a letter from the

then city planning director, William Healy (ph), to the California League of Cities. And in this letter, Mr. Healy states in pertinent part, "We could conceivably have instances where a parcel merged under the original state statute, unmerged under the current statute, and merged again upon adoption of local ordinances enacted pursuant to the current statute and will again merge under the new proposed section."

We feel this letter clearly shows that Mr. Healy was aware of the impact of the various changes in the statute.

APPELLATE JUDGE: I need help.

MR. ZAJAC: Yes.

APPELLATE JUDGE: If you'd go back, please, to 66424.2(b).

MR. ZAJAC: Yes.

[p. 5] APPELLATE JUDGE: And looking at your colored exhibits, which I appreciate, you said, "Any parcels which merge by operation of law," et cetera. We focused on (b). Now, that's in – you said September 1980.

MR. ZAJAC: Yes.

APPELLATE JUDGE: What is the significance of – first of all, what was the status of the property before (b) was enacted, and what, in your mind, is the significance of (b)?

MR. ZAJAC: The property had been merged under the original operation-of-law language.

APPELLATE JUDGE: Okay.

MR. ZAJAC: There were two changes in the statute. On July 7, 1977, the statute was amended to say that, You merge parcels pursuant to a local ordinance. And it provides for essentially an operational unmerger by ordinance.

APPELLATE JUDGE: Okay.

MR. ZAJAC: The statutes that came into effect in September of 1980, it's our belief that the language is quite clear that pursuant to that new section, the optional unmerger by ordinance no longer was optional. Those lots were deemed to be unmerged unless Del Mar went ahead, complied with their own local ordinance, provided Mr. Smith a hearing and a notice, and then merged the parcels.

APPELLATE JUDGE: The language in (b) is, "Any parcels which merge by operation of law before the enactment of a local ordinance adopted pursuant to division of Subdivision A are hereby deemed to be unmerged.

MR. ZAJAC: Yes.

[p. 6] APPELLATE JUDGE: And you're saying that merger of the lots that existed, it was unmerged by (b)?

MR. ZAJAC: Exactly, your Honor. Because it wasn't merged pursuant to the local enabling ordinance because the property was merged in April of 1977, and Del Mar's local enabling ordinance was not effective until September of 1977. So it's our contention that the new Subparagraph B, effective in September 1980, provides for an automatic unmerger unless Del Mar complied with

the statute and their subsequently enacted local enabling ordinance.

It's our belief that Mr. Healy's letter, Exhibit 183, shows that he knew that that was the reading of the statute, the appropriate reading of the statute.

In any event, subsequent to the change of – subsequent to Mr. Healy's letter, Exhibit 183, Mr. Smith requested that the City release the notice of merger. That's July 5, 1982. That was one of the dates that Judge Lester said could be one of the possible mergering dates for the taking.

On August 10, 1982, Mr. Warden, the City Attorney in Del Mar, thanked Mr. Smith for giving the City the option of purchasing the property and stated that with regard to the perceived cloud on the property, Del Mar had no present intent to acquire the property. That's Exhibit 33.

On August 18, 1982, Mr. Smith wrote to Warden, attaching the notice of merger, saying, Here is the cloud I am talking about. This is what I would like released. That's Exhibit 34.

On August 20, 1982, Mr. Warden prepared a memorandum to [p. 7] the city council which states, "It is clear that Mr. Smith is" – the word "is" is underlined – "talking about the merger notice" and suggested they talk about this at the next council meeting. That's Exhibit 2114.

Now, at this point in time, in the summer of 1982, there were two new council members on the Del Mar City Council, including Mrs. Arlene Carstin (ph). Mrs. Carstin came forward, despite a threat of litigation by the City of Del Mar, and testified that, during that summer of 1982,

she was present at a city council meeting where planning director William Healy stated that this merger was improperly done and was illegal and that they hoped that Mr. Smith would not find out about it.

That testimony, which was first delivered at a deposition, created a firestorm which raged throughout the litigation. Judge Marnson (ph) had ruled that, as Mr. Smith had made a prima facie case of fraud, that there was no attorney/client privilege as to the discussions dealing with the notice of merger.

Judge Lester overturned Judge Marnson's decision for law and motion but did allow certain limited testimony regarding the notice of merger. Dwight Warden, city attorney, stated that he told the council about the pros and the cons of the notice of merger, but he felt it could be kept on. City Manager Nelson stated that his recollection was that Mr. Warden advised the council that reasonable minds could differ.

APPELLATE JUDGE: Let me stop you again. It shows you that my mind is in slow motion, perhaps. Back to that point we talked about a moment ago. Looking at our bench memorandum as to [p. 8] the section you referred to earlier that we focused on, we have a sentence in the bench memorandum that said, "This amendment, however, did not go into effect. Instead, the legislature, in urgency legislation, enacted a Subdivision B to Section 66424.2, which provided" – and then it quotes the statutes enacted, the 1980 statutes, Chapter 1217, Section 3. Do you agree with the sentence, This amendment, however, did not go into effect?

MR. ZAJAC: Yes, your Honor. And the language that I read to you earlier from the Subdivision B was the enacted Subdivision B that was actually enacted. I haven't referenced the other statute that was passed but never became effective.

APPELLATE JUDGE: Well, I must have been looking at the wrong statute because (b) says, Any parcels which merged by operation of law which have not been deemed merged pursuant to local ordinance are hereby deemed to be unmerged. And in our case, they were merged pursuant to local ordinance. And consequently, why is your – why did the statute that you referred to unmerge the merger?

MR. ZAJAC: Your Honor, because the merger of the Snake Well (ph) property took place on April 28, 1977.

APPELLATE JUDGE: Okay.

MR. ZAJAC: And that was prior to –

APPELLATE JUDGE: You're talking about the operation-of-law merger. That's why I said don't suspend it. Why is it that the second ordinance was ineffective, the matter already having been done by operation of law?

MR. ZAJAC: Well, your Honor, pursuant to the Subdivision B that became effective, we feel that Del Mar would [p. 9] have had to have gone back and merged the property pursuant to the ordinance and that there was no merger pursuant to the local –

APPELLATE JUDGE: What's the defense, that they didn't then file a notice?

MR. ZAJAC: Exactly, your Honor. That they didn't follow through and merge the property pursuant to a local neighboring ordinance, which we feel is mandatory under the Subdivision B that became effective in 1980.

APPELLATE JUDGE: Well, to prove my mind is running slower than just this morning, I guess I will note sometime after the Mr. Smith buys the property –

MR. ZAJAC: Yes.

APPELLATE JUDGE: – aware that it's been merged, aware that a notice of merger has been recorded. I'm still – what you're arguing now is Mr. Smith, in 1981, has a right to have the City of Del Mar go back and give him notice under the statute and start over again. For why? I mean, other than our love of formalities and flogging land-use planning until everyone passes out, I'm still interested in what's the purpose of that.

MR. ZAJAC: The ordinance that became effective that provided the merger by a local ordinance, that was passed to provide greater local control of the mergers and recording the mergers. We feel that the Subdivision B that became effective, you know, makes it mandatory for the City to go back to that point in time.

I think the argument really – it's difficult, looking at the various minute changes in the law, but I think the [p. 10] argument is made by Mr. Healy's letter, because a literal reading of the statute combined with Mr. Healy's letter in Exhibit 183 –

APPELLATE JUDGE: Let's assume, for the sake of argument, that the City of Del Mar, the people, the City

employees, are all a bunch of lying crooks. What does that have to do with the issue here, this cause of action where Mr. Smith buys property already converted with a merger and a statute in effect – an ordinance in effect in September of '77? And you're now saying that as of 1981, for some reason Del Mar now needs to go back and give Mr. Smith notice of the merger, redo the merger or something.

MR. ZAJAC: Yes. I mean, to comply with the statute of –

APPELLATE JUDGE: Okay. Because it's there. It has to – I mean, notwithstanding actual notice at the time of purchase of this event and a statute in effect at the time authorizing the merger at the time of the purchase, you still have to go back.

MR. ZAJAC: And provide the property owner –

APPELLATE JUDGE: I understand the sequence. I understand your argument, also, because Del Mar didn't do all the legal niceties with its ordinance of merger; therefore, the property was unmerged by operation of law, provited [sic] by Section B. I understand that.

MR. ZAJAC: Yes.

APPELLATE JUDGE: Also, I think we can almost take judicial notice that Del Mar politics generally in the council is strident and contiguous and you find folks that say things on all [p. 11] sides of all issues. Put that aside. I don't think we need to provide that.

MR. ZAJAC: Yes, your Honor.

APPELLATE JUDGE: Granting all that, what about – two points. One, a letter was written, I think in '82 to Mr. Smith saying, This all doesn't really matter whether it's merged or unmerged. These are nonconforming lots, and you have to go ahead and subdivide it, and it's subdividing right now. Just make your applications because the merger – and the letter says, For these reasons, a merger appears to only have relatively insignificant impact on your property.

It seems to be facially well taken, and Mr. Smith has a problem because he didn't go ahead then and apply and move toward actual subdivision. I know your answer, Well, they have to be unmerged. That isn't an answer to this question because the proposition being laid out is, Go ahead and subdivide it.

MR. ZAJAC: Well, your Honor, I think the answer to that question is found in the California decision by the name of *Tillam* (ph). And it's cited in the brief. In that case, there was a property owner who had two parcels, Parcel A and Parcel B.

On Parcel A he had an apartment building. On Parcel B, it was vacant land. The city then proposed taking a ten-foot strip of that land and combine it with a setback requirement. It rendered this very narrow parcel, 50 feet wide, unusable.

What the City of Los Angeles argued in that case was, Well, the property owner should have went forward and sought a building permit. And what the Court of Appeals stated back to the City's contention was, Well, that was a useless act. I mean, [p. 12] there was no –

APPELLATE JUDGE: Why would it have been useless when the City says, Forget about the merger. Obviously – and I think Judge Lester pointed out one of these lots would be usable only for a railroad site because it's ten feet wide and 80 feet long. You're going to have to subdivide it to use it. Business offices or 8:00 to 5:00, come on in.

MR. ZAJAC: Well, our contention is that Mr. Smith should not have had to have applied and gone through the expense of seeking a new subdivision when he already had one pursuant to Government Code Section 66424.

APPELLATE JUDGE: What? He had the original 1910 lot?

MR. ZAJAC: Yes.

APPELLATE JUDGE: It was very buildable.

MR. ZAJAC: Well, subsequently, your Honor, when the City did release the notice of merger, and after some lot-line adjustments, several of the parcels now had –

APPELLATE JUDGE: I'm sure some of them – several of them may be, but certainly I'll bet not all 20.

MR. ZAJAC: Well, your Honor, what we're contending is what the taking was was taking the individual lots, is of the 20 individual lots, from '82 to '85, when it's our belief –

APPELLATE JUDGE: I can understand that, during that time that you're talking about.

MR. ZAJAC: And we don't really think that there should be a requirement that Mr. Smith go back and

seek the subdivision or have to go to the expense and the time, particularly in light of the somewhat acrimonious relationship between Mr. Smith and [p. 13] the City of Del Mar.

APPELLATE JUDGE: I don't know what other witnesses said, but I don't know of any city anyplace where any kind of development or building is more politicized and contentious han [sic] that. He could be putting a garage on it.

MR. ZAJAC: That's true, your Honor.

One final point, with regard to the activities which occurred in 1982. Mr. Warden's letter, Exhibit 36, despite, you know, the testimony that he discussed the pros and cons, despite the testimony that reasonable minds could differ, his letter, Exhibit 36, states that – to Mr. Smith, "There is simply no way that the City can now go back in time more than five years and undo that which it was compelled to do by state law."

Your Honor, we think that that statement contained in that letter that they couldn't undo what occurred is a misrepresentation. And this is shown not only by the fact that the law had changed and Mr. Healy, as shown in Exhibit 183, knew the impact of the change in the law, the change in the government code section, but we also feel that it is shown by the pertinent attorney general opinions, which at that point in time, in 1982, held that you couldn't merge property that had already been validly subdivided.

It's also shown, if I might briefly use one of the blow-up exhibits here, by the fact – and this is Exhibit 137 – by

the fact that the city, as part of this merger, merged conforming lots. They're one-acre lots, 781, 782, and 783, which are not contiguous to any of the less-than-one-acre lots, the nonconforming lots, which are on the other side of the property.

[p. 14] APPELLATE JUDGE: I know we have letters in the record attacking the merger generally under the statutes. I don't recall – can you point me to one saying, Well, the merger may be okay, but as for these three lots, it isn't?

MR. ZAJAC: No, your Honor. Mr. Smith's correspondence to the City –

APPELLATE JUDGE: It was in general. Broad based.

MR. ZAJAC: Broad based. Exactly.

In addition, the other affirmity that was pointed to at the trial was the fact that Mr. Healy had merged the state law property by reference to the tax assessor numbers, which even the new planning director, Ms. Strangard (ph), when she took over in 1985, said was very strange because the attorney general opinion showed that you don't merge property by a tax assessor number because the tax assessor numbers are not the legal lot of record.

Your Honors, I think it's pretty clear that the City here had essentially what was a passive park. The citizens in Del Mar had utilized the park for years. They had watched the fireworks from the park. There was an attempt at acquiring the park by the J. David Company. Nancy Hoover had toured the property in late 1982.

And when that fell apart, the City just decided they were going to keep this notice of merger on until Mr. Smith was finally, you know, forced in 1985, after the events involving the Del Mar Civic Association of Fair Council and to secure the release of the notice of merger.

If I might briefly point to –

APPELLATE JUDGE: You've got about give minutes left.

[p. 15] MR. ZAJAC: Your Honor, just 20 seconds.

I'd also like to stress that this is somewhat the granddaddy of all litigations involving Mr. Smith and the City of Del Mar and some of the property owners. There are more, your Honor. And my client has requested that I request that the court take judicial notice of Fourth District Case D-015814, which involves an alley writ, D-015917, which involves a city requirement for an environmental impact report on one of the lots.

APPELLATE JUDGE: To what end? Just to know that they're at each other's –

MR. ZAJAC: The existence. Exactly, your Honor. The existence of the case.

D-017058, which involves one of the law (indiscernible), Mrs. Roulette (ph), and D-017742.

APPELLATE JUDGE: I really don't know that it helps us at all to know that there's litigation about lots of things.

MR. ZAJAC: That's fine, your Honor.

APPELLATE JUDGE: I don't see any objection to knowing that they're there, but –

MR. ZAJAC: Thank you, your Honor. I'll reserve the rest of my time.

MR. McDOUGAL: May it please the Court, Lynn McDougal representing the Respondent.

First, just a note. With respect to that other litigation, I think that it is significant, from our standpoint, because it does show that the corporate –

APPELLATE JUDGE: (Indiscernible.)

[p. 16] MR. McDOUGAL: No. Not at all. Not at all, your Honor. I did not mean to imply that at all. What I do think it indicates clearly, though, is that there was a legitimate governmental purpose being advanced by the legislature and the City of Del Mar when they said dividing land in the '70s and the '80s is not like drawing up a map in 1911, 1912, 1913. There are other circumstances that need to be addressed. And Judge Lester, in his statement of the decision, say there are considerations in modern subdivision analysis, slope, grades, soils analysis, density, ecology, environmental concerns, drainage, esthetics, access, and easements.

And I would submit to you that when you look at this whole set of circumstances, that was exactly the purpose of the legislation and of the ordinance. And that was the purpose that Del Mar had. That is to say, this is an absolutely unique and beautiful site. It has sandstone hills. It's placed so it has a view to the ocean, a view to the inland.

If you're going to develop it now, you need to pay some attention to all of these things. And also, it just isn't feasible to have 20 different owners, each going in for building permits, each having to deal with utilities, each having to deal with all of the other immunities that were necessary for that.

Mr. Smith wanted that to happen because he didn't want to pay for it. He wanted to sell these lots to people and then have them pay for it. And what – this litigation that was mentioned by counsel is the residue of his insistence upon selling these off and then having these people try to individually develop them. Now –

[p. 17] APPELLATE JUDGE: What's wrong with that?

MR. McDOUGAL: Pardon me?

APPELLATE JUDGE: What's wrong – I mean, again, the City is taking the position that this property is better used as 20 separate parcels or 15 separate parcels. What's wrong with the fact that that's the way the owner wants to market it because that's what the city wants?

MR. McDOUGAL: What I would submit that the Court found and what I submit that the intent of the legislation is, that it is, in this day and age, necessary to develop property such as this as a unit in order to have orderly development, and also, parenthetically, to not subject a seller to litigation by the buyers because of problems that come along that weren't disclosed by a subdivision map and a Department of Real Estate notice and white page.

APPELLATE JUDGE: There's a thread that runs through this, however true it is, but it should be the intention of the city of Del Mar really would like to make a passive park or a nice environment out there where folks could go to enjoy the view, and that dividing it up and having it developed by owners really isn't the issue. They don't want development of it at all.

MR. McDOUGAL: I would submit, your Honor, that that thread is only put in this fabric by Mr. Zajac and Mr. Smith. The judge found that there was absolutely no evidence to support that position. The judge found that the City of Del Mar did nothing to try to encourage that being used as a park. As a matter of fact, there's a wall – has been always – all the way [p. 18] around it, varying from a few feet to very high.

So that was certainly not the finding of the Court. That was certainly not the evidence, as far as I was concerned, that was produced at the trial.

Now, I provided these marked documents, not that I necessarily wanted the credit for that – however, I will accept it – but because I think it's important to note that, contrary to what Mr. Zajac says, it's very clear that the exhibit – the third one down, marked Exhibit N-2, number three, that did not go into effect at all. And the number four, the fourth page down, did go into effect January 1, 1981.

Part of the problem with this whole thing was that nobody involved in this case until after the trial started realized that this Exhibit Number N-2(3), that that statute had never gone into effect, even for an instant. Everyone thought that that had gone into effect for an instant and

then been superseded by number four. And I think that's very significant because, as your Honor pointed out, if there has already been an ordinance enacted, then they weren't automatically unmerged.

We also provided – the very last page, we provided the ordinance. And I submit to you that Mr. Zajac referred to this as an enabling ordinance. I submit to you that that was an ordinance that fulfilled the statute that went into effect January – I'm sorry – July 7, 1977. That would be number two. And that provided that a local agency made by ordinance provide that if any one of such contiguous parcels or units held by the same owner, et cetera, shall be merged.

And I submit that we did – that the City of Del Mar [p. 19] did dot the I's and cross the T's necessary and that Judge Lester absolutely agreed that we were entirely lawful at the time that that merger was put on. I would –

APPELLATE JUDGE: Could you go back and make clear for me your position where it's argued that a merger occurred first? The statute and the ordinance occurred second and third respectively, and therefore, all September ordinance that's in effect, September '77, is relevant to this merger because this merger was completed before there was either a statute or an order.

MR. McDOUGAL: My answer to that is, I just absolutely do not subscribe to his theory that we had to go back and give new notices and do anything else.

As a matter of fact, as your Honor recalls – and I think it's clear from this set of documents – that when the legislature acted effective January 1, 1977, they were

merged. It was merged. But you had to go give some notice, and they did that. The City did that. They gave the notice, and they merged it.

Then in July of '77, they came back and said that they aren't automatically merged, but only if the City enacts an ordinance. We couldn't have enacted – we couldn't read the mind of the legislature and known that we had to enact an ordinance before –

APPELLATE JUDGE: You say July of '77. Which statute are you talking about? You're talking about the legislature said something in July of '77.

MR. McDOUGAL: Yes. It's number two – Exhibit N-2, [p. 20] number two, up in the right-hand corner.

APPELLATE JUDGE: That's the section that did not go into effect?

MR. McDOUGAL: No. That's the section that went into effect. And it went into effect July 7th. And pursuant to that, then, if you look at the very last sheet in that group, Exhibit M-2, on September 17, 1977, the City of Del Mar enacted that ordinance, which basically says that if it meets the criteria set forth by the legislature, then they are automatically merged. It doesn't say "automtically," but it says "merged."

APPELLATE JUDGE: I'm following along with you. Correct me if I'm lost here, but as of January '77, the City could merge without an ordinance, provided proper notice was given. They did give notice, and they merged it. Then in July, the legislature came up with a new idea about having an ordinance, and they then passed an

ordinance. But your view would be that the merger, as done then, was lawful on the then existing statute.

MR. McDOUGAL: I submit that that is absolutely correct, your Honor.

APPELLATE JUDGE: And that since the '80 brainchild of the legislature died, then the – effective January of '81, does not unwind to this, in your mind.

MR. McDOUGAL: That's right, your Honor. And I think specifically, when – in the statute, the urgency statute that's number four in that packet that went into effect January 1, 1981, clearly says down in (b), "Which have not been being merged pursuant to a local ordinance adopted pursuant to Subdivision A." [p. 21] And it just seems to me that they had to be including any of these mergers that occurred by operation of law which were later ratified by an ordinance. And I submit that's exactly what Del Mar did.

Now, just to put this in a little bit of historical perspective, this arose – this situation arose because of Hill against Manhattan Beach, which was in 1972, which there was an automatic merger that a Court found that there was an automatic merger. And then this process started about taking care of it.

But the point that I think is really significant is that at all times – at all times – Mr. Smith could have put in a meaningful development plan and had the City consider it and give the city council of Del Mar an opportunity to look at it and to see if they were going to force him to go through this resubdivision of the property or not.

They subsequently decided they wouldn't. They released the merger, and they even let him redraw his lot lines to some extent in order to go forward because he was insistent to go forward on the 19- – earlier subdivision map.

So I think that it indicates that that course of conduct was anything other than just being vengeful, just being spiteful, or trying to acquire the property without paying for it. I just submit. And indeed Judge Lester will – after hearing many, many days, 30 or more days of testimony, came to that exact conclusion.

APPELLATE JUDGE: What date did the property become unmerged?

MR. McDOUGAL: October 9, 1985.

[p. 22] APPELLATE JUDGE: Not when you agreed to it, but when, as a matter of law, did it become unmerged?

MR. McDOUGAL: October 9, 1985, your Honor.

APPELLATE JUDGE: Now, was there – in your mind, there's no inverse condemnation after that date?

MR. McDOUGAL: That was no inverse condemnation before or after, your Honor, I would submit. And that certainly was what Judge Lester found. He found, as a matter of fact, I believe, that there was no meaningful application submitted. And as your Honor knows, the law is still clear, even after *Lucas*, that there needs to be one of two things in order to have an inverse, and that has to be you have to deprive the owner of all viable economical use of his property – his or her property or the regulations have to go "too far."

And I submit that there were findings of fact on both of those issues, as well as determinations of law made by Judge Lester. And again, the important – I submit that the important governmental issue that was advanced by that was this problem of development in an orderly manner. And I submit that –

APPELLATE JUDGE: I just find that – I guess I just don't understand that. In other words, what you're saying is, because it's inconvenience to have 12 people apply for various things, that you're going to insist that the property be developed by one person. And in this case, if I understand it correctly, when he finally did file an application, it was denied. So why should somebody go through a useless act?

MR. McDOUGAL: Your Honor, Judge Lester clearly found – made findings that there was no meaningful application [p. 23] made.

APPELLATE JUDGE: I understand that. But why file an "application" when you know it's going to be turned down?

MR. McDOUGAL: The reason I would submit, your Honor, is basically the reason that one must exhaust administrative remedies. You need to give –

APPELLATE JUDGE: But the law is also crystal clear. You don't have to exhaust administrative remedies when you know the outcome. It's futile.

MR. McDOUGAL: I would submit, your Honor, that the cases pretty clearly say that there needs to be a final determination by the legislative body as to the intensity of development which will be allowed so that

then there can be a determination as to whether or not there was a taking.

And I would also submit, your Honor, that a legislative body which is submit to inverse condemnation should have a clear opportunity to decide, Are we going to impose this regulation with the possibility that there may be inverse condemnation, as claimed by the property owner, or are we going to let him or her go forward?

And I submit that otherwise, a legislative body does not have the ability to protect itself from inverse condemnation claimed. And that's why the courts, in the *Williamson* case, in the *Pennsylvania Coal* case – all those cases clearly say, Ripeness is absolutely imperative in these situations so that a court can look at exactly what they were allowed to do.

APPELLATE JUDGE: Assume, for the purpose of my question, that the merger of the Snake Well property was [p. 24] unlawful. The issue, nonetheless, is whether there was a taking. And it's your position there was no taking because the court said, Just try to market and/or develop the property as a contiguous piece of property.

I'm concerned with that from a factual perspective. Is there anything in the record that expressly assumes facts that say that, Even had the property been divided into lots, I nonetheless want to develop it as a unit because this was economically more sensible, or is this an inference drawn by the trial court?

MR. McDOUGAL: I think that there was – well, first, I think one very significant point was Mr. Smith

tried to market this property all the way through the times that the merger was on it as a whole. As a matter of fact, he actually got a measure on the ballot for the people to vote on that would make – allow him to put in a hotel and also to have all residents of Del Mar have half price at happy hour. And that occurred – could I finish, your Honor?

APPELLATE JUDGE: Sure.

MR. McDOUGAL: I'm sorry to interrupt.

And the reason that that's significant is that that election didn't take place until after the merger was released. He signed listings for the property as a whole, after the merger was released. He signed listings for the property as a whole, after the merger was released.

APPELLATE JUDGE: Well, let's assume that – I'm emphasizing perhaps accurately with his mind set. The only way I'm ever going to see this property is as a unit because I'm not going to get anything from that stonewalling City of Del Mar. [p. 25] And consequently, I have to market it this way because I have no alternative.

Why isn't – why – the fact that he does X – I mean, in terms of logic, I'm sure you've heard the story about the man who is really snapping his fingers to keep the elephants away, and they say, What are you doing that for? Well, to keep the elephants away. Well, you don't see any elephants, do you? So the inference here is, well, he's intentionally developing the property that way because that's his wish. That's his desire.

Why is it a logical interest, assuming it's a legal interest, to bring this up, a fact-of-law question? The

reason he's doing it is because he knows he can't develop it with the City of Del Mar. So he has no alternative. So he's got a piece of property that Del Mar is not going to allow him to do anything with other than developing as a unit.

How can you draw – I mean, what I'm trying to say is, why isn't that a taking? I.e the fact that he's doing X only means that he's doing X. It doesn't mean that he hasn't been deprived of doing A, B, and C.

MR. McDOUGAL: I think the answer, your Honor, is still the supreme court's definitions and the courts in California. And the point is, you don't have an inverse condemnation situation unless you deprive the owner of all economical viability of the property. And that just wasn't done. Just because he could not sell it out individually by lot did not even significant – my judgment- and Judge Lester was convinced of it – did not even significantly reduce the value of the property.

[p. 26] APPELLATE JUDGE: In other words, assuming that you have a – picture a pie. The fact that you can't use any piece of that pie, save for a little sliver of the pie, that's not a taking . I.e. the fact that that sliver has economic value is sufficient to preclude an inverse condemnation.

MR. McDOUGAL: Yes, your Honor. Yes. And interestingly enough, the U.S. Supreme Court in the *Lucas* case went on and on and on about that issue and said- finally saying, Yes, indeed, sometimes it will be a hardship upon a property owner where one property owner is deprived of all economic viability and thence has a cause of action.

But another property owner will still retain some five percent or ten percent of the value of the property and not. But they said, There's no other way to deal with it, and that's what the law is. As your Honors know, in our brief, we indicated a lot of the cases – five or six or seven cases – which dealt with the situation where the value of the property went down significantly.

APPELLATE JUDGE: Let me amend that – I'm sorry – understand that. A principle of law, in interest of something Mr. Zajac referred to, he said that, in fact, since 1985 of the unmerger, some of these lots have indeed been developed after the lot line adjustment. Is that correct?

MR. McDOUGAL: Yes.

APPELLATE JUDGE: Okay. And also, what significance do you place on the 1982 letter inviting the subdivision? That doesn't sound to me as if the City of Del Mar, at that point, at any rate, is saying, You better go either international airport [p. 27] or a hotel, because you sure aren't going to built houses.

MR. McDOUGAL: Absolutely, your Honor. That's exactly right, and that's exactly what Judge Lester found was that he still had his property. That had this – this merger was this horrendous cloud. I submit that all it did was clearly indicate that the 1911, 1912, 1913 subdivisions were not sufficient to develop that property.

APPELLATE JUDGE: Could you move a little faster with your time and sum up?

MR. McDOUGAL: I just would submit that, from the factual determinations indicated by Judge Lester, that the elements of an inverse condemnation just were not present in that it did not – during that time, it did not deprive him of all economically viable ability to use the property, and two, that the regulations didn't go too far.

Thank you very much.

APPELLATE JUDGE: Thank you. Mr. Zajac?

MR. ZAJAC: Thank you, your Honor.

First of all, I'd like to apologize for not clarifying earlier that Mr. McDougal had indeed provided the statute. I don't think I would have highlighted the same exact words Mr. McDougal highlighted.

First of all, I never discussed or analyzed the third statute that's attached here. The statute which I was referencing was the – actually, the effective version in 1980. It's our contention that, under any literal reading of that statute, the property should have been deemed unmerged at that point in time when the second statute became effective in 1980. [p. 28] More importantly, it's not only my contention, Mr. Healy understood that to be the case, as shown in his letter of April 12th.

Mr. McDougal said that there was no real evidence of any wrongdoing. I submit that Mrs. Carstin's testimony that the City wanted to preserve this property as it was as a park is evidence of the City's wrongdoing in this matter.

Secondly, there was extensive evidence submitted at trial, not only from Mr. Smith, his companion in life,

Joyce Chapman Smith, and other Del Mar residents, including Lou Domini (ph), that the City residents had long viewed this property as a park and climbed over the walls, in fact, for the 4th of July fireworks until Mr. Smith opened the gates so no one would injure themselves.

Finally, we're not really talking about developing the property as a whole. I think the record from the trial was quite clear. And there is extensive testimony from various individuals that Mr. Smith tried everything possible to sell this property as a whole to a wealthy individual, to a corporation, to a religious group. What we're talking about is the taking of the 18 of the 20 individual lots. The 18 lots where Mr. Smith's residence do not lie upon.

And I think the important analysis here is found beginning with the Selby Realty case, in which the California Supreme Court found that an invasion or appropriation of a property right is a taking. We submit that this property right, as established not only in Government Code Section 66424, but also in the *Taper v. Long Beach* (ph) decision, was the right to [p. 29] sell, lease, convey or finance 18 of those lots.

Obviously, Mr. Smith's financial problems at the time would have been lessened if he would be able to break up some of those lots and been able to sell them. He could not because of a merger. In addition, the other property right that we feel was taken here was the right to exclude others from the property. And that's established by the *Cox Cable* decision, a Fourth District case, and various other California Court of Appeals decisions.

Finally, with regard to the question of all use, the California authorities, including the Mira Mesa Development Corporation case, the Fourth District case, all hold that all use is equated with viable economic use. We will admit that Mr. Smith did have the property, the whole property, to walk his dog, to enjoy, but we don't think that, under the California authority that they feel the need to tour one's property as equated with viable economic use.

Finally, Mr. McDougal raised the question of the exhaustion of the administrative remedies. Judge Lester had found that the City could not assert recent authority found in the *California Coastal Commission v. Han* (ph) decision based on an estoppel which was established by the September 16, 1982 letter of Mr. Warden, in which he told Mr. Smith that there was nothing the City could undo the notice of merger.

Finally, on the question –

APPELLATE JUDGE: That's your third finally, the last one.

MR. ZAJAC: I apologize, your Honor.

[p. 30] Mr. McDougal raised the question of all use and public use as equated with a taking. I would just reference the Court to the recent South Carolina decision as provided by in a letter to the Court approximately ten days ago. In Footnote 7 in that decision, the United States Supreme Court opined that taking 80 percent of one's property could constitute a taking. And here, 18 of the 20 lots would be 90 percent.

Thank you, your Honor.

APPELLATE JUDGE: Thank you, counsel. The matter is submitted.

(Proceedings adjourned.)

CERTIFICATE

I certify that the foregoing is a verbatim transcription prepared from the electronic sound recording produced at the proceedings in the above-entitled matter, and is a true and accurate transcript of said proceedings to the best of my ability and belief.

/s/ Shonna D. Ruane — 7-7-93
Transcriber — Date

APPENDIX G

HILLYER & IRWIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
550 WEST C STREET, 16TH FLOOR
SAN DIEGO, CALIFORNIA 92101-3540

TELEPHONE (619) 234-6121
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[Names on Letterhead Omitted in Printing]

January 29, 1993

8131.7

Mr. Stephen M. Kelly, Clerk
Court of Appeal – Fourth Appellate Dist.
Division One
750 B Street
San Diego, CA 92101

Re: Smith v. City of Del Mar
Case No. D011536

Dear Mr. Kelly:

I am forwarding herewith a copy of the recent United States Supreme Court decision in *Lucas v. South Carolina Coastal Council,* D.A.R., 06/30/92, pgs. 9030-9051. The decision in *Lucas* extensively analyzes when a public entity's actions constitute a taking, which is one of the critical issues in the above-referenced case scheduled for oral argument on February 9, 1993. As this case was decided on June 29, 1992, several months after appellant's reply brief was filed with the Fourth District Court of Appeal, we are now submitting a copy of this case for the

court's review. Of particular importance is footnote 7 in the majority decision at page 9036.

I am also forwarding a copy of this letter, together with a copy of this case to lead counsel for the City of Del Mar, Lynn McDougal.

Sincerely,

HILLYER & IRWIN

/s/ Robert L. Zajac
Robert L. Zajac

RLZ/kmk
Enclosure
cc: Lynn McDougal, Esq.
James E. Smith

APPENDIX H

State of California
GOVERNOR'S OFFICE
OFFICE OF LOCAL GOVERNMENT AFFAIRS
1400 TENTH STREET
SACRAMENTO 95814

(Seal)
GEORGE DEUKMEJIAN
GOVERNOR

March 6, 1990

Mr. James E. Smith
2100 Gatun Street
Del Mar, CA 92014

Dear Mr. Smith:

Thank you for your letter to the Governor. I have been asked to respond on his behalf. I will address each of your three requests in turn.

(1) Executive Order D-78-89:

Enclosed is a copy of the Governor's Executive Order D-78-89. It is directed at state agencies and is intended to remind them of their constitutional duty to avoid taking private property without just compensation. The executive order reiterates the constitutional prohibition on regulatory takings, as interpreted by the courts.

(2) California agency responsible for approval of the City of Del Mar's community plan:

Under state law, each city and county in California must adopt a general plan to guide its future development. However, a city is not required to have its general plan

approved by the state. The same is true for any community plans adopted by the city. I have enclosed our publication entitled *A Guide to Planning in California* which explains this.

Del Mar is located within the coastal zone and, as a result, is subject to the California Coastal Act. The Coastal Act requires that the city prepare a Local Coastal Program (LCP) which includes land use plans and ordinances to regulate development within the coastal zone. The Coastal Commission must review and certify each LCP in order to ensure that it promotes the policies of the Coastal Act. For information about the status of Del Mar's LCP, contact the California Coastal Commission's San Diego area office at 1333 Camino Del Rio South, Suite 125, San Diego, CA 92108. Their telephone number is (619) 297-9740.

(3) The effect of Executive Order D-78-89 on Del Mar's enforcement of its community plan:

Simply put, the Governor's order does not apply to the city and therefore does not affect the city's planning activities. Regardless of whether or not the Governor has issued an executive order, however, the city is obligated to uphold the provisions of the U.S. and California Constitutions.

The attorney general's opinion that you reference in your letter (CV-78-135, 5/25/79) is obsolete. State law with

respect to the merger and unmerger of lots was substantially revised in 1984 and 1985. I have enclosed our publication *Merger and Local Governments* explaining the current merger statutes.

Sincerely,

/s/ Antero Rivasplata
Antero Rivasplata,
Principal Planner

enclosures

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

(Seal)

EXECUTIVE ORDER D-78-89

WHEREAS, the Fifth Amendment to the United States Constitution, applicable to the State of California by the Fourteenth Amendment, and Article I, Section 19, of the California Constitution, guarantee that private property shall not be taken for public use without just compensation; and

WHEREAS, recent United States Supreme Court decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, have affirmed that state governmental actions, including regulations, that do not formally invoke the condemnation power may

result in a taking of private property, even temporarily, for which just compensation is required; and

WHEREAS, responsible fiscal management and fundamental principles of good government require that government decision makers evaluate carefully the effect of their regulatory actions on constitutionally protected private property rights; and

WHEREAS, the executive branch of the State of California is comprised of numerous agencies, departments, boards and commissions whose decisions may potentially affect private property interests; and

WHEREAS, state government should be a leader in demonstrating sensitive consideration of protected private property rights and in avoiding unintended and undue financial burdens on the state budget, while state agencies fulfill their statutory duties;

NOW, THEREFORE, I, George Deukmejian, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

1. All agencies, departments, boards, and commissions shall:

a. Consistent with fulfilling their statutory duties, evaluate their proposed regulatory actions in light of guidance provided in the aforementioned Supreme Court decisions and other relevant judicial authority in order to ensure the appropriate protection of private property rights consistent with the provisions of the United States and California Constitutions.

b. Assure that their actions are properly supported by the administrative record, by statutory and other legal authority, and fully comply with the guidance set forth by the United States Supreme Court, including consideration of the following principles:

(i) Governmental actions resulting in a physical invasion, or physical damage to private property may constitute a taking.

(ii) Governmental actions which interfere with the use and enjoyment of, or access to and from private property may constitute a taking.

(iii) For governmental actions which amount to a taking the actions result in a "temporary" taking.

2. The legal staff of the Department of General Services may be requested to provide guidance and technical assistance to any departments seeking to evaluate the potential private property impacts of agency proposals.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 20th day of December 1989.

/s/ George Deukmejian
Governor of California

ATTEST:

/s/ March Fong Eu
Secretary of State

(Seal)

APPENDIX I

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,
NORTH COUNTY BRANCH

JAMES E. SMITH, Plaintiff, vs. THE CITY OF DEL MAR, and DOES 1 through 100, inclusive, Defendants.	CASE NO. N38218 JUDGMENT AFTER COURT TRIAL (Filed Nov. 13, 1989)

This action was filed by Plaintiff, JAMES E. SMITH, on September 19, 1987. The matter came on regularly for trial by Court on May 23, 1989, in Department A of the above-entitled court, the Honorable J. MORGAN LESTER Judge presiding. Plaintiff, JAMES E. SMITH appeared by and through his attorneys of record, HILLYER & IRWIN, ROBERT L. ZAJAC. Defendant, CITY OF DEL MAR, appeared by and through its attorneys of record, McDOUGAL, LOVE, ECKIS, GRINDLE & O'CONNOR, LYNN R. McDOUGAL and KYLE M. McDOUGAL.

At the conclusion of Plaintiff's case, counsel for Plaintiff moved the Court to allow Plaintiff to amend the Third Cause of Action to include a claim for damages against Defendant based upon inverse condemnation. Said motion to amend is hereby granted. Defendant's subsequent motion to deem each and every allegation of

the amended caused [sic] of action denied is also hereby granted.

Defendant, at the conclusion of Plaintiff's case, moved the Court for judgment in Defendant's favor on the Second Cause of Action and the Third Cause of Action, as amended, pursuant to California Code of Civil Procedure Section 631.8. After consideration of the documents, pleadings and records on file herein, testimony, evidence and argument presented at trial, and after due deliberation, the court rendered judgment for Defendant on the Second Cause of Action and the Third Cause of Action, as amended.

Defendant presented evidence regarding the First Cause of Action and Plaintiff presented evidence in rebuttal. The matter was then submitted to the court for determination. After consideration of the documents, pleadings and records on file herein, testimony, evidence and argument presented at trial, and after due deliberation, the court rendered a statement of its intended decision in writing, ruling for Defendant on the First Cause of Action.

THE COURT HEREBY FINDS AS FOLLOWS:

1. As to the First Cause of Action:

a. The merger and the Notice of Merger approved and recorded by Defendant was proper and pursuant to California law.

b. Release of the merger and/or recordation of the Release of Notice of Merger was discretionary with Defendant from the date of imposition through October 9, 1985, the date it was released by Defendant.

c. The imposition of the merger and/or the recordation of the Notice of Merger did not amount to an unlawful taking of Plaintiff's property rights by Defendant in that Plaintiff was not deprived of all use of the subject property, nor was Plaintiff denied viable economic use of the subject property.

d. Approval of the merger and recordation of the Notice of Merger were not over-regulations of Plaintiff's property that went "too far" and thus did not constitute an unlawful taking of Plaintiff's property.

e. An attack on the merger and Notice of Merger "as applied" to Plaintiff's property is not a ripe controversy because Plaintiff had never submitted a development plan to Defendant for a final determination under the regulations applicable to the subject property.

f. Plaintiff sustained no injury sufficient to support an award of damages by virtue of any action and/or lack of action by Defendant or its employees with regard to the Notice of Merger.

2. As to the Second Cause of Action:

a. Plaintiff failed to exhaust his administrative remedies.

b. The regulatory actions by Defendant, specifically the adoption of the Community (General) Plan, the R1-40 Zone, the Bluff, Slope & Canyon Overlay Zone, the Open Space Overlay Zone and other building and zoning regulations applicable to the subject property did not amount to an unlawful taking by Defendant.

3. As to the Third Cause of Action:

a. There was no duty upon Defendant to provide information to Plaintiff regarding the number of lots or building sites held by Plaintiff.

b. Should there have existed a duty on Defendant to provide a response to the Del Mar Civic Association's request, the proper answer to the request was "one lot or building site."

c. Plaintiff failed to exhaust his administrative remedies by bringing any action of lack of action on the part of Defendant and/or its employees to the attention of the Del Mar City Council.

d. There was no unlawful taking of Plaintiff's property rights by Defendant or its employees in relation to its action and/or inaction regarding the Del Mar Civic Association. The Del Mar Civic Association was a non-profit organization that did not provide any opportunity for personal monetary gain through membership in the organization, thus, there was no unlawful taking of any of Plaintiff's property rights.

e. Corporations Code Sections 7911, 8610, and 5034 require only a majority vote by the membership to transfer corporate assets and to dissolve a corporation, thus, the number of votes held by Plaintiff was irrelevant to the outcome of the actions by the Del Mar Civic Association as described in the Third Cause of Action of the Second Amended Complaint on file herein.

4. Defendant shall recover from Plaintiff costs of suit incurred;

Dated: NOV 13 1989

J. MORGAN LESTER
J. MORGAN LESTER,
Judge of the
San Diego Superior Court

APPENDIX J

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

JAMES E. SMITH, Plaintiff, vs. THE CITY OF DEL MAR and DOES 1 through 100, inclusive, Defendants.	No. N38218 AMENDMENT TO STATEMENT OF DECISION (Filed Oct. 27, 1989)

The Statement of Decision now includes analysis of the following requested items by plaintiff:

1. Whether or not a taking occurred by The City of Del Mar during the time period from December 9, 1977, the date of James E. Smith's purchase of the Snakewall property to October 9, 1985, the date of the recordation of the Release of the Notice of Merger?

Answer: Based on the court's analysis in the Statement of Decision, there was no taking by the non-possessory regulatory action.

2. Whether or not a taking occurred by The City of Del Mar during the time period from September 16, 1982, the date Exhibit 36 was forwarded to James E. Smith, to October 9, 1985, the date of the recordation of the Release of the Notice of Merger?

Answer: The court again finds no taking during this time period.

3. Whether the applicable law, including California Attorney General opinions interpreting Government Code section 66424.2, allowed the Notice of Merger to remain on the Snakewall property between December 9, 1977 to October 9, 1985?

Answer: Yes.

4. Whether it was legally appropriate for former Planning Director William Healy on behalf on The City of Del Mar to merge the Snakewall property based on tax assessor numbers assigned to that property in 1977?

Answer: Yes.

5. Whether or not The City of Del Mar committed a deliberate fraud in refusing to release the Notice of Merger after James E. Smith requested its release in 1982 (see Exhibit 36)?

Answer: The court made evidentiary rulings on this subject, and reference thereto in the main Statement of Decision; since there is no fraud cause of action, no further finding is necessary.

DATED: OCT 27 1989

J. MORGAN LESTER
JUDGE OF THE
SUPERIOR COURT

APPENDIX K

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

JAMES E. SMITH, Plaintiff, vs. THE CITY OF DEL MAR and DOES 1 through 100, inclusive, Defendants.	No. N38218 STATEMENT OF DECISION (Filed Aug. 15, 1989)

The plaintiff has standing to maintain this action for inverse condemnation against the City of Del Mar. Even though he was not the owner during the time that the Notice of Merger was first placed on the "Snakewall Property", he purchased the property in the same year, 1977. He also purchased the property, aware of its single-parcel merged status. The court finds that the 1947 case of *United States v. Dickinson*, 331 U.S. 745, does not apply to the facts of this case. The merger of twenty lots into one approximately twenty-acre parcel was occasioned by the City of Del Mar filing a Notice of Merger, which was recorded April 28, 1977, in recognition of a then new Government Code Section, 66424.2. The original version of this statute became effective on January 1, 1977 and permitted the merger to legally occur by operation of law. Later, on July 1, 1977, that same statute was amended to allow mergers to be accomplished by authorized localities enacting an appropriate ordinance. Del Mar did

just that in September, 1977. The court finds that the Notice of Merger was properly placed upon the "Snakewall Property", and properly continued in effect until January 1, 1980. July 5, 1982 is when Mr. Smith first made a written request to the City of Del Mar to remove the "cloud" (meaning merger) from his property. After a multitude of events, the Notice of Merger was removed from the "Snakewall Property" by the City of Del Mar on October 9, 1985, as so recorded (Exhibit 52).

The "continuing wrong" principle, espoused in *Barbaccia v. The County of Santa Clara,* 451 F.Supp. 260 (1978), is dispositive of both the statute of limitations argument and the question as to whether the plaintiff, as a subsequent owner after the Notice of Merger occurred, has standing to maintain this action for inverse condemnation. That case held that when there is a continuous chain of events the statute of limitations would not begin to run until the time of the final act in that series of events. Arguably, the end of those acts was July 5, 1982, when the plaintiff first requested release of the Notice of Merger, but the release was not forthcoming until 1985, and it was only at that final act that the plaintiff was in a position to access damages. *Barbaccia, supra,* p. 260, states that this rule allows an aggrieved property owner the opportunity to assess the full measure of damages before filing suit, and multiplicity of actions can thereby be avoided. *Pierpont INN, Inc. v. California,* 70 C.2d 282 (1969) followed the same principal in another condemnation case. The applicable statute of limitations here is C.C.P. § 318 providing for five years. Since the court finds that Mr. Smith obtained the rights of the prior owner, and that the continuing nature of the merger on his property is best

analyzed under a "continuing wrong" theory from August 10, 1982 (Exhibit 33) to December 1985, two results obtain. First, the plaintiff has standing to maintain this action. A property owner (at the time of the damaging) has standing, *City of Los Angeles v. Ricards,* 10 C.3d 385, 389. Secondly, since the case was first filed on September 17, 1987, it was timely.

The court earlier ruled that there was no condition precedent for the plaintiff to bring an Administrative Mandamus action prior to this case, despite the recent case of *California Coastal Commission, et al. v. Superior Court, A.W. Ham, Jr.,* filed May 18, 1989, real party in interest. That case required a precedent Administrative Mandamus proceeding prior to allowing an inverse condemnation action. However, the question of retroactivity aside, although it is major, the court found that the City of Del Mar is estopped to raise this as a defense in view of the inaccurate letter sent to the plaintiff by the City Attorney for the City of Del Mar on September 16, 1982 (Exhibit 36). Although after hearing the evidence the court feels that the argument for estoppel is weaker than before, it still applies. It does not deem it appropriate to change the prior ruling, particularly in view of the following analysis.

Although a thorough review of the oft-amended and confused treatment of Gov. Code Section 66424.2 by the legislature makes a clear understanding of the rule against perpetuities pale by comparison, the dispositive issue is not the statute itself. As the court noted above, the initial merger by operation of law was legal, and the continued merger by adoption of the enabling ordinance in September, 1977 continued the merger in legal effect.

There was a January 1, 1980 amendment amongst the water fall of others which can well be argued to either mandate or allow for the removal of the Notice of Merger. However, from 1980 to August 10, 1982 (Exhibit 33), the plaintiff had no development plans manifested for individual lot treatment of the "Snakewall Property", and in fact was trying to sell the entire property as a single unit to the City of Del Mar during the spring of 1982. No injury can be found to plaintiff during this period. *City of Los Angeles v. Ricards, supra,* p. 389. The City of Del Mar gave notice to the plaintiff of their refusal to purchase the property on August 2, 1982 (Exhibit 33).

Due to these activities, the plaintiff's request for the release of merger in his July 5, 1982 letter (Exhibit 30) only became transformed into a meaningful request once the City of Del Mar refused the property purchase. The reason for this is that in that same July 5, 1982 letter the plaintiff was trying to induce the City to purchase his property. The request for the release of the Notice of Merger was only conditioned upon a possible refusal of the City to go ahead with the purchase. It is clear from *City of Los Angeles v. Ricards,* 10 C.3d 385 (1973) that there can be no valid claim against a government agency for inverse condemnation when the property owner is not doing any thing with the property which the supposed "taking" is damaging. It was not until the plaintiff knew for sure that the City of Del Mar was rejecting the purchase of the "Snakewall Property" that he could realistically be affected by the Notice of Merger remaining on his property. There was no meaningful effort by the plaintiff to market his property in individual lots before. Regardless of whether the City of Del Mar could or

should have released the Notice of Merger prior to August 2, 1982 (Exhibit 33), it is merely academic in view of the foregoing. It appears that the Notice of Merger was removable on an optional basis, rather than mandated basis, and in fact was removed in December, 1985.

The singular remaining question, therefore, is if there is a "taking" requiring just compensation for the City of Del Mar continuing the merger in effect from the date the City refused to purchase the "Snakewall Property" on August 10, 1982 (Exhibit 33) until its removal on October 9, 1985 (Exhibit 52). Framed more closely, is this temporary, regulatory, non-possessory action by the City of Del Mar a "taking" under the facts of this case and the current state of the law? A careful review of the authorities indicate it *is not*.

In California inverse condemnation law for either posessory [sic] or permanent regulatory takings, the general rule was recited in *Selby Realty Co. v. City of San Buena-Ventura*, 10 C.3d 110 at 119 and 120. The rule stated is, "In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury". As will be shown later, for regulatory, temporary takings one must be deprived of either the economic viability of his property or virtually all use when there is a temporary regulatory taking alleged. The court in *Selby, supra*, was determining the effectiveness of pleading and the sustaining of a demurrer of the first cause of action when commenting on *Klopping v. City of Whittier*, 8 Cal.3d 39 (1972). In the *Klopping* case, *supra*, the city there actually

initiated condemnation proceedings against the property, and later dismissed the action, but in so doing continued to threaten to take the entire property from the plaintiff in the future. That court held that the continued threat of a "total taking", which could negatively affect the rental income of the property, might properly be the basis for inverse condemnation. This case, as in *Selby, supra,* involved either the possessory, or threatened possessory, and permanent type of a "taking". Neither case is controlling in the newly opened area of a temporary regulatory action by a governmental agency.

Prior to the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S.Ct. 2378 (1987), the rule was that a temporary "taking" for inverse condemnation purposes could only avail the aggrieved property owner with declaratory relief or mandamus challenge to the regulation. There was no damage remedy for a temporary regulatory taking per *Agins v. Tiburon,* 24 Cal.3d 266, and aff'd on other grounds, 447 U.S. 255. Also decided during the same term, *Nollan v. Calif. Coastal Commission,* 483 U.S. ___, 97 L.Ed2d 766, 107 S.Ct. ___ (1987) at page 685, the court noted that there would not be a question of a right to compensation for the landowner if the easement sought by the governmental agency was on a permanent basis, but in that case the request for public access was a condition to the issuance of a land use permit. The court found that as such, the resultant infringement with one's possession of one's beachfront amounted to a compensable taking.

Historically, a "taking" has received a variety of definitions. Once again, *Agins v. Tiburon,* 24 C.3d 266, reached the U.S. Supreme Court, 447 U.S. 255. The court noted

that zoning ordinances were not facially a "taking" in that case, but were also not defective "as applied" as the owner had not submitted a plan for development, and hence no controversy was ripe. Prior to the release of the Notice of Merger in 1985, the plaintiff had not sought any development plan on an individual lot basis. His belated claim that there could have been a taking during a period in which he never made an appropriate application is but one fatal defect to this case. Although the *First English* case, *supra,* reversed the *Agins* case on other grounds, the ripeness analysis remains the law.

In *Penn. Coal Co. v. Mahon* (1922), 43 S.Ct. 158, 260 U.S. 393, the court held that a regulation that goes too far can be a taking, and the taking depends on the facts of the particular case. In *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, the court noted that a taking required analysis of the extent of the interference with the property rights, and that diminition [sic] in value alone does not automatically cause a taking. That court recognized that while economic impact was a relevant consideration, it was not wholly determinative. Further support of this principle is *Danforth v. U.S.,* 308 U.S. 271, wherein the court noted that fluctuations in property value after governmental projects or legislation are not singularly determinative of whether or not "a taking" has occurred, p. 285.

The *Penn Central, supra,* p. 137, court distinguishes between a loss of potential use (of air space) and the fact that there are viable economic alternative uses available to the owner. Here there were those alternatives available to the plaintiff. As will be noted later, not the least of which was his grand design for a first rate Del Mar resort

hotel complex on the Snakewall Property. The U.S. Supreme Court in *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, found that when the plaintiff was denied approval for an intensive residential development, such denial could not be equated with a denial of "any development". The court went on to say . . . "A governmental entity is not required to permit a landowner to develop property to (the) full extent he might desire or be charged with an unconstitutional taking of the property." The court went on to note that the permit refusal did not preclude valuable alternative development, p. 347. As the court will note below, the plaintiff was not denied valuable alternative development by virtue of the merger remaining on his property between August of 1982 and October of 1985.

Factually, the plaintiff here purchased the "Snakewall Property" in 1977 and enjoyed it as a beautiful ocean and inland view estate from 1977 until selling parcels after the release of merger in 1985. Thereon he was able to roam the beautiful land, walk his beloved dogs, "Joe" and "Foxy", and occupy the largest estate in the City of Del Mar. While living part-time in Missouri until a fire destroyed his Missouri farmhouse in 1982, the plaintiff also lived part-time on this large twenty-acre estate. He improved the house with an approximate $200,000 infusion, and walked his walled estate almost daily. The court notes, after personally walking the property per stipulation and in the presence of counsel, that the "Snakewall Property" is unique, beautiful property with walking trails, torrey pines, sandstone bluffs, panoramic views of ocean and inland, a beautiful residence, and separate guest house. Only a handful of royalty on a worldwide

basis could compare with such living conditions as Mr. Smith, the plaintiff, has enjoyed since 1977. The nature and extent of this use alone should be sufficient to find a valuable alternative use other than what the merger made more difficult, i.e., individual lot sales. The court finds that one of the compelling reasons for mergers to occur was to consolidate yet undeveloped lands existing under ancient and outdated subdivisions which took no account of the relevant considerations in modern subdivision analysis (slope, grade, soils analysis, density, ecology, and environmental concerns, drainage, asthetics, access, and easements are only some of such concerns). As such, Mr. Smith, even after the merger, was not precluded, and in fact was told by Mr. Pearson, a former Del Mar Mayor and land use specialist, that he should obtain a new subdivision and that in the alternative, he should seek a precise plan which would allow clustering of lot sites, and he could then move on with lot development. The plaintiff did neither.

Prior to requesting that the Notice of Merger be removed, plaintiff in 1977 had purchased the Snakewall Property for $825,000. The result of two appraisals placed the value at $1.75 million (Exhibit 25, Parnell appraisal) and $4.0 million dollars (Exhibit 26, Diamond appraisal), respectively, a few years later in February, 1982 and May, 1982. After plaintiff returned from Missouri in 1982 and began full-time residence on the Snakewall Property, he offered commissions to real estate salespeople to sell the entire estate. Oftentimes the sales price was over five million dollars. Concentrated sales efforts were to no avail, but the presence of the merger did not prevent plaintiff from attempting to market this palacial [sic]

estate to very wealthy inividuals [sic] and corporations. Many of these earlier sales efforts are shown on plaintiff's Exhibit 187, pages 2 and 3. This aggressive and sustained marketing campaign continued from July 31, 1982 when a representative of the Jelly Co. was shown the property, and was continued on a "whole" estate basis with few if any exceptions until the hotel ballot measure failed in 1986. As noted above, the plaintiff and the City of Del Mar were in negotiations for the sale and purchase of the property. After that, the plaintiff sought to get approval from the City of Del Mar for construction of a first-rate resort hotel with available memberships for Del Mar residents. Failing this, he was able to obtain enough signatures to have the measure placed on the ballot for voter approval. Del Mar voters defeated the proposal in April, 1986. This was several months after the release of Notice of Merger in December, 1985.

From the foregoing it is clear that the alleged abuse by the City of Del Mar was a temporary regulatory action which restricted individual lot sales in the absence of a new subdivision or precise plan. The many uses of the property by the plaintiff, as residence, estate sales efforts, hotel enterprise measures, and the potential of development with a new subdivision and/or precise plan to include clustering of residences, and retention of open space, clearly show that the plaintiff was not deprived of "all use" of the property. He merely chose to continue pursuing his own designs under the original old subdivision of 1913.

As to unsuitability of the original 1913 subdivision, it must also be noted that the original subdivision had one lot, B, which was approximately 240 feet long and twenty

feet wide. Other than possible use for a railway siding, the lot was simply undevelopable in realistic terms. Other infirmities plagued the aged subdivision such as the vacation of most of the interior access means, and an absence of the considerations already noted above which are modern subdivision concerns. Is there the legal justification for finding a "taking" when less than all use is involved? Again, the answer is no.

Analysis of the rules of "takings" must accommodate the nature and form of the taking. In *Barbaccia, supra,* p. 266, the court noted that the question of whether a taking occurred was a factual one. Under the facts here, the alleged taking is of the form present in *First English, supra,* in that it was a temporary measure of regulatory nature. *First English* established a newly created form of liability beyond declaratory relief and mandamus challenges for temporary takings. Even if one construes the merger to be an unreasonable continued restraint, is it so much of a restraint as to ripen into a "taking"? The answer must be *no. First English* court, *supra,* although establishing a new form of damage recovery for property owners, was very careful to note that for there to be a "taking" of a temporary nature the taking had to be of "all use of his property", p. 2381, "total use of his lands", p. 2382, "all use", p. 2384, "all use", p. 2388. The court was creating a measured change from the *Agins, supra,* rule, but was not opening the flood gates. Without this high level of restraint being required, allowing damages for other trifling forms of government regulation would encourage a myriad of unfounded complaints. Hardly a modern landowner cannot imagine some zoning, or other ordinance which he or she would wish did not limit their

use of their land. Viewed through another analysis, the California Appellate Court, upon the return of the *First English, supra,* case, issued another opinion in 89 D.A.R. 6876, in which the court looked to the nature of the regulation involved and clung to the "bright line approach" of an "all use" standard. There the court also noted another approach would look to see if there was a justifiable governmental or public interest being protected.

As the court noted in the analysis of the returned matter before them under the "all use" or legitimate governmental interest basis, there was no taking as there were other alternative uses for the property, p. 6879. As stated above, Mr. Smith was not prohibited from various meaningful uses of the "Snakewall Property". Here there was no viable economic use of the plaintiff's land denied during 1982 through 1985, when the hotel measure was underway. (See *First English,* 89 D.A.R. 6876, p. 6878. Accordingly, the court finds that there was no taking. The merger was a very limited restriction upon the plaintiff, which he chose not to avert by getting a new subdivision or precise plan. These facts cannot pave the way for a damage recovery. Plaintiff retained vast uses and alternatives to his property. It may be noted that as of today, the plaintiff has sold nine of the original twenty lots for over $4 million dollars. One is hard pressed to realistically manufacture a "taking" or damage from such facts.

Plaintiff complains that the merger was placed to allow the City of Del Mar to control development of the property. In modern day property use, seldom does an owner have absolute reign over all possible uses of his property. It is an expedient and modern necessity that

property development be marshalled in an orderly and responsible fashion. This was recognized by Justice Powell in *Agins v. City of Tiburon, supra,* pp. 261-262. When one lives inside a city's limits and owns property there, one must recognize the likelihood that the municipality will act in the furtherance of what is deemed to be in the public interest for property development. Del Mar is not a vast wasteland or a back country area like the Ozarks. Plaintiff is troubled that the City of Del Mar has any input over what he can do with his property. Although there has been predictable resistance to plaintiff's refusal to acknowledge the sovereignty of the City of Del Mar and its inherent powers, the City did finally extend to the plaintiff inordinate concessions in allowing massive lot line adjustments to occur. This provided plaintiff an end run around the necessity of getting a new subdivision or precise plan, and allowed him to thereby sell several lots to new buyers. They unfortunately inherited some of the same resistance engendered by plaintiff's numerous conflicts with the City of Del Mar in the past.

Even if one were to disagree with the foregoing analysis, there is no possible damage award. If there were a "taking" found, how is there damage when during the same period complained of the plaintiff was not trying to sell individual lots, but was in fact embarking on his resort hotel plan? Having studied this plan it was in fact quite realistic, and in the long run may have been the highest and best use of this property not only for the plaintiff, but also for the residents of Del Mar. As noted in City of Los Angeles v. Ricard, 10 C.3d 385, if an owner is not doing something in the interim period, wherein the "taking" is then causing damage, there is nothing upon

which to premise a damage award. Here there was no development attempts on an individual lot basis by the plaintiff until the Notice of Merger was released in October, 1985. There is no clear identifiable injury to the plaintiff. Any damages claimed would be speculative at best, and hence not awardable under standard jury instructions.

Costs to defendant, City of Del Mar, and no fee award.

DATED: 8-15-89

/s/ Illegible
Judge of the Superior Court
J. MORGAN LESTER

APPENDIX L

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SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

JAMES E. SMITH, Plaintiff, vs. THE CITY OF DEL MAR and DOES 1 through 100, inclusive, Defendants.	CASE NO. N 38218 SECOND AMENDED COMPLAINT (Filed Nov. 14, 1988)

Plaintiff alleges:

FIRST CAUSE OF ACTION

(Inverse Condemnation)

1. Plaintiff JAMES E. SMITH ("SMITH") is an individual residing in THE CITY OF DEL MAR, and is the owner in fee simple of 11 of the 20 separate parcels which are collectively known as the Snakewall Property, more particularly identified as:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with that portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

Plaintiff has during 1987 and 1988 sold 9 of the 20 above-referenced parcels making up the Snakewall Property. During the time period between December 9, 1977, and August 20, 1987, SMITH owned all 20 of the above-referenced lots making up the Snakewall Property.

2. Defendant THE CITY OF DEL MAR is a municipal corporation in the State of California.

3. Defendants DOES 1 through 100, inclusive, whether, individual, corporate or otherwise, are fictitious names of Defendants whose true names are not at this

time known to Plaintiff; Plaintiff is informed and believes and thereon alleges that each of said fictitiously named Defendants, whether individuals, partnerships, corporations or otherwise, are in some way liable or responsible to the Plaintiff on the facts hereinafter alleged and at such time as Defendants' true names become known to Plaintiff, Plaintiff will ask leave of this Court to amend this complaint to insert said true names.

4. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, including those designated as DOES 1 through 100, at all times herein mentioned were the agents, servants, and employees of the remaining Defendants, and as such, within the times mentioned herein were acting within the purpose, course and scope of such agency, service and employment, and with the consent, permission and ratification of the remaining Defendants.

5. THE CITY OF DEL MAR recorded a Notice of Merger in the Official Records of San Diego County on April 28, 1977. A true and correct copy of this Notice of Merger is attached hereto and incorporated herein as Exhibit "A." This Notice of Merger clouded title to the Snakewall property, reduced its market value, and prevented the sale of the above-referenced individual Snakewall lots from April 28, 1977 to the date a Release of Notice of Merger was recorded on October 9, 1985.

6. Shortly after purchasing the property, and continuing thereafter, Petitioner SMITH made several repeated requests to THE CITY OF DEL MAR to release this Notice of Merger, as this Notice of Merger combined

the 20 individual parcels of land in the Snakewall Property into one lot. THE CITY OF DEL MAR repeatedly refused any and all request by Petitioner SMITH to release this Notice of Merger.

7. In or about July, 1980, the pertinent Government Code Section by which THE CITY OF DEL MAR merged the individual Snakewall lots was revised so that any lots previously merged under that Section were deemed to be unmerged. Despite this clear change in the statute, THE CITY OF DEL MAR refused thereafter to release this Notice of Merger until October 9, 1985. A true and correct copy of the release of this Notice of Merger is attached hereto and incorporated herein as Exhibit "B."

8. Despite repeated requests of Defendant SMITH to be compensated for the periods in which the CITY refused to release this Notice of Merger, THE CITY OF DEL MAR has repeatedly refused any and all requests to provide compensation to SMITH for preventing his selling the individual Snakewall lots and for blocking development on the Snakewall Property.

9. Under the United States Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* ___ U.S. ___, 107 S.Ct. 2378 (1987), the above-referenced actions of THE CITY OF DEL MAR constitute a temporary taking of all use of 18 of the 20 lots making up the Snakewall Property, for which Petitioner SMITH is entitled to full and complete compensation in an amount from THE CITY OF DEL MAR in excess of $2,000,000.00, or according to proof at trial. Plaintiff has received no compensation for the damage to his property caused by this temporary taking by THE CITY

OF DEL MAR. Plaintiff has also suffered further consequential damages as a result of this Notice of Merger and THE CITY OF DEL MAR's failure to release this Notice of Merger as set forth above.

10. Plaintiff has incurred and will continue to incur attorneys' and appraisal fees because of this proceeding, in amounts that cannot yet be ascertained which are recoverable in this action under Code of Civil Procedure section 1036.

SECOND CAUSE OF ACTION

(Inverse Condemnation)

11. Plaintiff incorporates paragraphs 1 through 5 of his First Cause Action as if set forth in full herein.

12. On or about July 23, 1975, the Del Mar City Council passed Ordinance No. 246, which amended the Del Mar Municipal Code Zoning provisions. Pursuant to this Ordinance, the Snakewall Property was designated R1-40, which allows only one dwelling unit per acre. With regard to the individual lots making up the Snakewall Property, lots G, H, I, J, K, L, M, N, O and S, as shown on the Arden Heights No. 3, Map No. 1285, September 22, 1910, and Lots A, B, T, and U, as shown on the Arden Heights No. 4, Map No. 1343, recorded June 8, 1911, were nonconforming lots on or about July 23, 1975 and continuing thereafter, as these lots are less than one acre. This zoning change creating the nonconforming lots at the Snakewall Property was a prerequisite to the recording of the Notice of Merger, all as more fully set forth above.

13. THE CITY OF DEL MAR has at no point in time enacted development standards for nonconforming lots within THE CITY OF DEL MAR, including the nonconforming R1-40 Snakewall lots referenced above.

14. On or about December 4, 1975, the City Council of Del Mar enacted Ordinance No. 1-250, which imposed the bluff, slope and canyon overlay zone and the open space overlay zone on the Snakewall Property. The Snakewall Property at that time was, and continues to be, one of a handful of properties within the CITY OF DEL MAR which has both the above-referenced overlay zone designations imposed on it. These overlays zone limit the type and construction of residences which can be construed within these overlay zones.

15. Further, the Community Plan inacted [sic] by THE CITY OF DEL MAR states that it is the CITY's intent to acquire certain designated open-space properties within THE CITY OF DEL MAR. One of these designated open space properties within THE CITY OF DEL MAR identified within the Community Plan as providing a prominent vista and an important watershed, as well as a hiking area is the Snakewall Property.

16. During the early 1980's THE CITY OF DEL MAR pursuant to its plan to acquire open-space properties, attempted to acquire the Snakewall Property, but was unwilling to pay plaintiff plaintiff's asking price for the property.

17. THE CITY OF DEL MAR's actions with regard to the zoning designations of the property, including the creation of the nonconforming R1-40 lots, the imposition of the open space and bluff, slope and canyon overlay

zones, and THE CITY OF DEL MAR's failure to create development standards for nonconforming lots prevented plaintiff SMITH from securing the reasonable economic use of the Snakewall Property, were unreasonable and constitute a taking from the date of purchase to the present day.

18. THE CITY OF DEL MAR's above-described activities further caused a dimunition of the value of plaintiff's property, rendered it unmarketable and unleaseable for substantial periods of time, and caused plaintiff SMITH damages in an amount according to proof at trial. Further, plaintiff has suffered consequential damages as a result of the zoning designations and other activities undertaken by the City of Del Mar as set forth above.

19. Plaintiff has incurred and will continue to incur attorney and appraisal fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under Code of Civil Procedure § 1036.

THIRD CAUSE OF ACTION

(Declaratory Relief)

20. Plaintiff incorporates paragraphs 1 and 10 of his First Cause Action as if set forth in full herein.

21. An actual convroversy has arisen and now exists between Plaintiff and Defendant THE CITY OF DEL MAR concerning the Del Mar Civic Association, a dissolved California non-profit, mutual benefit corporation. Plaintiff SMITH alleges, and Defendant THE CITY OF DEL

MAR disputes, the Plaintiff SMITH was deprived of his full and complete 20 votes in Del Mar Civic Association matters by the CITY's unilateral and arbitrary refusal to recognize 20 separate lots during the time period from 1977 to 1985 and prevented Petitioner SMITH from utilizing a full 20 votes in the Del Mar Civic Association. SMITH alleges that THE CITY OF DEL MAR failed to follow its Ordinance 246 with respect to the definition contained therein with respect to building sites, which impacted SMITH's rights in the Del Mar Civic Association matters as set forth in the Articles of Incorporation and Bylaws of the Del Mar Civic Association. As a result of THE CITY OF DEL MAR's unjustified refusal to recognize 20 separate lots, SMITH was prevented from fully participating in decisions made by the Del Mar Civic Association, and decisions made by the Del Mar Civic Association could have been altered through Plaintiff SMITH's full participation as owner of 20 separate lots. THE CITY OF DEL MAR disputes these contentions.

22. A true and correct copy of THE CITY OF DEL MAR's Ordinance No. 246 is attached hereto as Exhibit "C," and a true and correct copy of the Articles of Incorporation and Bylaws of the Del Mar Civic Association is attached hereto as Exhibit "D."

23. Plaintiff desires a judicial determination of his rights and duties, and a declaration as to whether THE CITY OF DEL MAR wrongfully interfered with a valid and existing property right with regard to the Del Mar Civic Association by refusing to recognize 20 separate lots at the Snakewall Property during the time above-referenced period.

24. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiff may ascertain his rights and duties which he was prevented from exercising through THE CITY OF DEL MAR's failure to recognize 20 separate lots at the Snakewall Property between 1977 and 1985 thereby affecting SMITH's voting rights in Del Mar Civic Association matters. Further, a judicial declaration is further necessary and appropriate at this time as the plaintiffs in *Norman Elliott, et al. v. Del Mar Civic Assoc., etc., et al*, San Diego Superior Court Case No. N29095, are attempting to void the results of the May 7, 1985, Del Mar Civic Association meeting at which the Del Mar Civic Association was dissolved and certain beachfront property transferred to THE CITY OF DEL MAR.

25. Through the actions of THE CITY OF DEL MAR refusing to recognize the 20 separate lots of the Snakewall Property, therefore affecting SMITH's voting rights within the Del Mar Civic Association, Petitioner SMITH has been damaged in a sum according to proof at trial.

26. Additionally, SMITH is informed and believes that THE CITY OF DEL MAR and the Del Mar Civic Association entered into an Indemnity Agreement which in part provided that any Del Mar Civic Association member would be indemnified by THE CITY OF DEL MAR for all costs, including attorneys' fees, in any action from or associated with the membership vote at the above-referenced meeting which transferred certain beachfront property to THE CITY OF DEL MAR. SMITH is informed and believes that he is entitled to his attorneys' fees under this Indemnity Agreement and has incurred, and will continue to incur, attorneys' fees in

prosecuting this cause of action. SMITH is informed and believes that a true and correct copy of this Indemnity Agreement is attached hereto and incorporated herein as Exhibit "E."

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION

1. For an amount in excess of $2,000,000.00 or according to proof at trial, with interest thereon at the legal rate from the date of the damages, said amount continuing to increase, for the damages incurred by SMITH by and through this taking;

2. For consequential damages according to proof for the actions undertaken by THE CITY OF DEL MAR which resulted in a taking; and

3. For reasonable attorneys' and appraisal fees according to proof.

ON THE SECOND CAUSE OF ACTION

1. For an amount according to proof at trial, with interest thereon at the legal interest rate from the date of damages, said amount continuing to increase, for the damages incurred by SMITH through this taking;

2. For consequential damages according to proof for the actions undertaken by the City of Del Mar which resulted in the above-referenced taking; and

3. For reasonable attorneys' and appraisal fees according to proof at trial.

ON THE THIRD CAUSE OF ACTION

1. For a declaration that THE CITY OF DEL MAR wrongfully interfered with SMITH's valid and existing property rights by refusing to recognize 20 separate lots in the Snakewall Property between 1977 and 1985, thereby affecting SMITH's voting rights in Del Mar Civic Association matters;

2. For an amount exceeding the jurisdictional limit of the Court, or according to proof at trial for the damages incurred by SMITH by THE CITY OF DEL MAR's interference with his above-referenced property right; and

3. For reasonable attorneys' fees on this cause of action based on the Indemnity Agreement between THE CITY OF DEL MAR and the Del Mar Civic Association.

ON ALL CAUSES OF ACTION

1. For costs of suit incurred herein; and

2. For such other and further relief as the Court deems just and proper.

DATED: November 14, 1988

HILLYER & IRWIN

By: /s/ Robert L. Zajac
Robert L. Zajac
Attorney for Plaintiff
JAMES E. SMITH

VERIFICATION

I am the Plaintiff in the above-entitled action; I have read the foregoing Second Amended Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 1988 at Del Mar, California.

/s/ James E. Smith
JAMES E. SMITH

EXHIBIT A

WHEN RECORDED, RETURN TO:

CITY CLERK
CITY OF DEL MAR
1050 Camino del Mar
Del Mar, CA. 92014

NOTICE OF MERGER

(Recorded April 28, 1977)

Pursuant to the provisions of California Government Code Section 66424.2, the Del Mar City Council, at its regular meeting of March 21, 1977, has made the following findings concerning parcels of land generally bounded by San Diequito Drive, Zapo Street and Serpentine Drive (Assessor's Parcels Nos. 299-192-9, 10, 11 and

12; 299-200-6, 7 & 8; and 299-261-12 & 13) in the City of Del Mar and owned by HOME BUSINESS DEVELOPMENT CORPORATION:

1) the parcels are contiguous and have common ownership; and

2) at least one of the parcels does not conform to the City's standards for minimum parcel size to permit use or development under the City's current zoning for the area (R-1-40 Zone); and

3) at least one of the parcels is not developed with a building for which a permit has been issued.

Based on the above findings, the parcels described in the attached Exhibit "A" are now MERGED into one contiguous parcel.

In witness whereof, I have hereunto set my hand and affixed the seal of the City of Del Mar this 28th day of March 1977.

/s/ Terri Bianco
Terri Bianco, City Clerk
City of Del Mar, California

The land referred to in the Notice of Merger for which this document is Exhibit "A" is situated in the State of California, County of San Diego, and is described as follows:

Lots G,H,I,J,K,L,M,N,O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public

use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285 filed in the Office of County Recorder of San Diego County; and

Lots A and B in Block 37 and T and U in Block 12, together with that portion of "Gatun Street" lying southeasterly of the southwesterly prolongation of the northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to map thereof No. 1343 filed in the Office of County Recorder of San Diego County; and

Lots 780 through 785 inclusive, together with that portion of "Oribia Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6 in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592 filed in the Office of County Recorder of San Diego County.

EXHIBIT B

RECORDED AT REQUEST OF:
Attorney

WHEN RECORDED, RETURN TO:

CITY CLERK
CITY OF DEL MAR
1050 Camino del Mar
Del Mar, CA 92014

Robert L. Zajac, Esq.
HILLYER & IRWIN
530 "B" Street, Suite 1400
San Diego, CA 92101
Home Business Development Corporation
Record Owner

NO FEE

RELEASE OF NOTICE OF MERGER

(Recorded Oct. 9, 1985)

The Notice of Merger recorded at File/Page No. 77-159862, recorded in the Official Records of San Diego County on April 28, 1977 merging the parcels described in the attached Exhibit "A" to that Notice of Merger is hereby released.

In witness whereof, I have hereunto set my hand and affixed the seal of the City of Del Mar this 8th day of October 1985.

This document is executed in accordance with Resolution No. 85-53.

[SEAL]

/s/ Robert Nelson
Robert Nelson,
CITY MANAGER
CITY OF DEL MAR,
CALIFORNIA

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

On this 8 day of October, 1985, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Robert Nelson, known to me to be the City Manager of the city of Del Mar, and known to me to be the person who executed the within instrument on behalf of said corporation, agency, or political subdivision, and acknowledged to me that such public corporation, agency, or political subdivision executed the within instrument.

/s/ June J. Stevens
Signature (SEAL)

This is a true certified copy of the record if it bears the seal, imprinted in purple ink, of the Recorder. (SEAL)

Vera L. Lyles, Recorder

San Diego California

OCT 9, 1985

EXHIBIT "A"

RELEASE OF NOTICE OF MERGER

The parcels which make up the land which were merged pursuant to the Notice of Merger recorded on April 28, 1977 in the Official Records of San Diego County at File/ Page No. 77-159862 and which are now, pursuant to the attached Release of Notice of Merger, unmerged into twenty (20) separate parcels are described as follows:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285 filed in the Office of County Recorder of San Diego County; and

Lots A and B in Block 37 and T and U in Block 12, together with that portion of "Gatun Street" lying southeasterly of the southwesterly prolongation of the northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to map thereof No. 1343 filed in the Office of County Recorder of San Diego County; and

Lots 780 through 785 inclusive, together with that portion of "Oribia Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6 in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592 filed in the Office of County Recorder of San Diego County.

EXHIBIT C

ORDINANCE NO. 246

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DEL MAR AMENDING CHAPTER 30 OF THE MUNICIPAL CODE RELATING TO ZONING AND LAND USE REGULATIONS IN ORDER TO BRING ABOUT CONFORMANCE BETWEEN THE 1975 DEL MAR COMMUNITY PLAN AND THE DEL MAR ZONING ORDINANCE.

WHEREAS, Government Code Section 65860 requires that the zoning ordinances of the City of Del Mar be consistent with its general plan; and

WHEREAS, the General Plan for the City of Del Mar was adopted by the City Council on May 15, 1975; and

WHEREAS, the concepts contained in the General Plan are innovative and unique and do not lend themselves to the application of the City of Del Mar's existing zoning ordinance;

NOW, THEREFORE, the City Council of the City of Del Mar does hereby ordain as follows:

1. Articles I through VII of Chapter 30 of the Del Mar Municipal Code are hereby repealed.

2. Articles I, II, and III as attached hereto and by this reference made a part hereof, including a zoning districts map, are hereby added to Chapter 30 of the Del Mar Municipal Code.

3. The Zoning District Map of the City of Del Mar is hereby amended accordingly.

PASSED AND ADOPTED by the City Council of the City of Del Mar, California, this 23rd day of June, 1975, by the following vote:

AYES: Councilmembers Shepard, Hoover; Mayor Rypinski.

NOES: Councilmember Pearson

ABSENT: Councilmember Weare

ABSTAIN: None

/s/ Nancy Hoover
NANCY HOOVER
Mayor Pro Tem

ATTEST:
/s/ J. Wayne Dernetz
J. WAYNE DERNETZ, CITY CLERK

June 23, 1975

ARTICLE I. IN GENERAL

Sec. 30-1. Recitals.

San Diego County, and particularly the coastal zone of the County, has recently experienced and is continuing to experience rapid growth in economic activity and population resulting in increased land development and utilization of coastal resources.

The temperate climate, high quality natural environment, and proximity to the Pacific Ocean have made the coastal portions of San Diego County a highly desirable living area.

It can be expected that the rapid rate of growth in San Diego County will continue due to the County's desirable location and the redirection of growth from other areas of the state to San Diego County.

Realization of the pace and extent of change that is now evident in the coastal areas of San Diego County, and the potential problems that uncontrolled and haphazard growth may generate, has led the Del Mar City Council to institute a comprehensive review of the Del Mar General Plan. This program, undertaken with considerable input from the citizens of Del Mar, has resulted in the preparation and adoption of a new comprehensive General Plan (called Community Plan) to ensure that the anticipated growth within Del Mar is not subject to the problems associated with haphazard land development and that further, such growth is organized, planned and coordinated in a manner that will not place undue burdens on the City of Del Mar or its ability to provide urban services and facilities.

The overall thrust of the Community Plan is to preserve the unique environment, low density character and quality of life within Del Mar. The overall goal which shall be used to guide the future development of the community is stated in the Del Mar Community Plan:

> "OVERALL GOAL: PRESERVE AND ENHANCE THE SPECIAL CHARACTER OF DEL MAR, THE ELEMENTS OF WHICH ARE A VILLAGE-LIKE COMMUNITY OF SUBSTANTIALLY SINGLE FAMILY RESIDENTIAL CHARACTER, A PICTURESQUE AND RUGGED SITE, AND A BEAUTIFUL BEACH."

The zoning regulations of the City of Del Mar are adopted to protect, promote and enhance the public health, safety and general welfare, and more specifically, to ensure that development within the City of Del Mar is consistent with the Del Mar Community Plan. Specifically, these regulations are adopted to achieve the following goals of the Del Mar Community Plan:

" I. Establish without delay a comprehensive program to preserve and acquire permanent open space sufficient to meet the long-range needs of the community, preserve and enhance natural resources, and protect areas and people susceptible to seismic and flooding hazards.

II. Minimize the impact of the automobile on the character of Del Mar and emphasize a more pedestrian oriented environment, safer sidewalks, landscaped buffer zones, and alternate means of transportation.

III. Preserve and enhance Del Mar's special residential character and small town atmosphere with its harmonious blending of buildings and landscape in proximity to a beautiful shoreline.

IV. Focus major retail and office activity into one economically viable, pedestrian oriented and attractive area that serves the needs of both Del Mar residents and visitors, and is well integrated into the residential fabric of the community.

V. Preserve the economic integrity of the community.

VI. Assure continuing participation in city planning by developing procedures in which citizens can participate in updating Community Plan goals and policies and help in implementing programs including consultation and advice on enabling legislation."

Sec. 30-2. Definitions.

For the purpose of this Chapter, the following words and phrases shall have the meanings respectively ascribed to them by this Section:

Accessory building. A portion of the main building or a detached subordinate building located on the same lot, which is devoted exclusively to an accessory use.

Building, main. The principal building on a lot or building site designed or used to accommodate the primary use to which the premises are devoted. Where a permissible use involves more than one structure designed or used for the primary purpose, as in the case of group houses, each such permissible building on one lot, as defined by this Chapter, shall be construed as constituting a main building.

Building site. Such term shall mean:

(1) The ground area of one (1) lot; or

(2) The ground area of two or more lots when used in combination for a building or permitted group of

buildings, together with all open spaces as required by this Chapter; or

(3) A parcel of real property other than a "lot," as defined in this section, which was held as a separate ownership of record prior to April 4, 1960, and which has vehicular access to a street; or

(4) A parcel of real property shown as a delineated parcel of land with a letter or other designation on a final map of subdivision approved pursuant to this Code and other ordinances of the city and recorded in the office of the County Recorder.

Building site front. In the case of an interior lot, the portion an adjacent to the street; in the case of a double frontage or through lot, both street frontages; on corner lots the front shall be on the street with the least street frontage or in the event that the frontage on each street is equal, then the property owner may select which frontage shall be considered the front of the lot, provided the front yard for any existing building adjacent to the selected line conforms to the applicable front setback requirement.

Business. The purchase, sale, lease, rent or other transaction involving the handling or disposition of any article, service, substance or commodity for livelihood or profit; or the management of office buildings, offices, recreational or amusement enterprises, or the maintenance and use of offices, structures and premises by professions and trades rendering services.

Club. An association of persons for some common purpose, but not including groups organized primarily to

render a service which is customarily carried on as a business.

College. A college, junior college or university supported by public funds, or a private college, junior college, or university which gives comparable general academic instruction and degrees.

* * *

Sec. 30-17. Compliance with Article.

All buildings, structures, improvements or portions thereof hereafter erected, constructed, converted, established, altered or enlarged shall provide and maintain thereafter the requirements as set forth in the following table and special provisions; except, that the provisions of minimum lot area shall not be applied to any parcel of real property which satisfies the definition of a "building site" as set forth in Sec. 30-2.

ARTICLE II. DISTRICTS

Sec. 30-18. Establishment of Districts.

The following districts are hereby established to carry out the intent and achieve the objectives of the Del Mar Community Plan and this ordinance:

A. Base Districts.

(1) Residential:

(a) R-1-40: Res. Very Low Density.

(0-1 dwelling units/net acre.)

(b) R-1-14: Res. Low Density Modified.

(1-3 dwelling units/net acre.)

(c) R-1-10: Res. Low Density.

(1-4 dwelling units/net acre.)

(d) R-1-5: Res. Medium Density Single.

(4.4-8.8 dwelling units/net acre.)

(e) R-1-6: Res. Medium Density Single.

(4.4-8.8 dwelling units/net acre.)

(f) R-3-5(2.5): Res. Medium Density Multiple.

(4.4-8.8 dwelling units/net acre.)

(g) R-3-4: Res. Medium Density Multiple.

(4.4-10.8 dwelling units/net acre.

(h) R-2-3.5: Res. High Density.

(8.8-12.4 dwelling units/net acre.

(2) Commercial:

(a) "C-C": Com. – Central.

(b) "C-R": Com. – Residential.

(c) "C-V": Com. – Visitor.

(d) "C-Rec": Com. – Recreation.

(e) "C-S": Com. – Service.

(3) Railroad Right-of-Way: "RR".

(4) Public Facilities: "PF".

(5) Public Parklands: "P".

(6) Floodway and Lagoon: "FW/L".

B. Overlay Districts.

(1) "OS": Open Space Overlay District.

(2) "BSC": Bluff, Slope and Canyon District.

Sec. 30-19. Districts and Interpretation of District Boundaries.

The City of Del Mar is hereby divided into districts and the boundaries of the districts hereby established shall be shown on the Zoning District Map of the City of Del Mar. The Zoning District Map shall show the classification and boundaries of all districts and upon adoption in the manner required by the State of California Planning and Zoning Law, shall be a part of this ordinance as if incorporated herein. Overlay districts shall be indicated by parenthetically enclosed letters as a suffix to the base district symbol. In the event of a conflict between the provisions of an overlay district and the provisions of a base district, the provisions of the overlay district shall prevail.

Where uncertainly exists as to the boundaries of districts on the Zoning District Map, the following rules shall apply:

(1) Boundaries indicated as approximately following the centerlines of streets, highways, or alleys shall be construed to follow such centerlines and in the event of the change in the centerline shall be construed as moving with the centerline;

(2) Boundaries indicated as approximately following the right of way lines of streets, highways, or alleys shall be construed to follow such right of way lines, and in the event of change in the right of way line shall be construed as moving with the right of way line;

(3) Boundaries indicated as approximately following the centerlines of streams, rivers, canals, lakes or other bodies of water, or flood control channels shall be construed to follow such centerlines and in the event of change of the centerline shall be construed as moving with the centerline.

(4) Boundaries indicated as approximately following platted lot lines shall be construed to follow such lot lines;

(5) Boundaries indicated as parallel to or extensions of features indicated in subsections (1) through (4) above shall be so construed. Distances not specifically indicated on the official Zoning District Map shall be determined by the scale of the map;

(6) Where a street or alley is vacated or abandoned, the regulations applicable to the property to which it is reverted shall apply to such vacated or abandoned street or alley;

(7) In case any further uncertainty exists, the Planning Commission shall determine the location of such boundaries.

Sec. 30-20. Amendments and Changes of District Boundaries.

The City Council may amend, supplement, or change the regulations and districts herein or subsequently established after recommendation thereupon by the Planning Commission and after public hearings as required by law. An amendment, supplement or change may be initiated by the City Council, by the Planning Commission or by petition of the owners of the subject property.

Whenever the owner of any land desires a reclassification of his property or a change of the land use district or regulations pertaining to his property, and after he has complied with prefiling requirements, if any, applicable to his proposal, the landowner or his duly authorized agent shall present his request to the Planning Commission on the form furnished by the Commission. The form, setting forth the request and any related facts, circumstances or information, shall be filed with the Director of Planning together with the fee established by resolution of the City Council payable to the City of Del Mar. The Planning Commission shall hear the request and shall take such action as it deems necessary in order to proceed with any studies, surveys, investigations or hearings as may be required by law. Within fifteen (15) days after the hearing the written recommendation of the Planning Commission together with findings or other matters as may be related to the request shall be transmitted to the City Council.

In the case of action by the Planning Commission on a landowner's request recommending against the adoption of a reclassification of property or change of the land

use district or regulations pertaining to a request, the City Council shall take no further action thereon unless the owner of the land or his duly authorized agent or any member of the City Council shall request a hearing by filing a written request with the City Clerk within five (5) days after the recommendations of the Planning Commission have been transmitted to the City Council. Failure to file such a written request within five (5) calendar days shall result in termination of the case.

The City Council, after receipt of the report recommending approval of the application or the written request for hearing shall hold at least one public hearing and shall thereafter proceed to act on the report and recommendation as provided by the California Planning and Zoning Law (California Government Code, Section 65854 et seq.).

When it is found necessary for the preservation of the health, safety and general welfare of the public, the orderly development of the City of Del Mar, and the implementation of the Del Mar Community Plan, the City Council or Planning Commission may require as a condition precedent to a change of zone, the dedication of property or the installation of facilities either on-site or off-site as may be deemed necessary to protect the public investment and to make the affected properties suitable for the uses permitted by the amendment, supplement, or change in regulations or district. The facilities or matters so required shall be completed or reasonable guarantees acceptable to the City shall be provided for their completion prior to the adoption of any such amendment, supplement or change in regulations or district.

Changes in district boundaries shall be made a part of the Zoning Map in fulfillment of the provisions for amendment set forth in this Section.

Sec. 30-21. R-1-40 Very Low Density Residential Zone.

A. Description and Purpose.

This land use category is intended to allow single family development that preserves an open character and protects the unique environment in areas of steep slopes, bluffs and/or canyons. Factors of topography, the character of existing low density residential areas, and the need to separate Del Mar as a distinct and separate community shall be taken into account in areas where this zoning applies.

B. Community Plan Density Designation.

The density in the R-1-40 Very Low Density Residential zone shall not exceed 1 dwelling unit/net acre.

C. Uses Permitted.

(1) A one-family dwelling on each building site.

(2) Two-family dwellings and two (2) single-family dwellings in existence as of (date of adoption).

(3) Accessory buildings and uses customarily incidental thereto, including a private garage or private carport to accomodate [sic] not more than three motor vehicles.

(4) The renting of not more than one room to not more than one person, or the providing of table board to one person, or both.

(5) Dogs and cats as household pets, and other household pets normally kept within the house,

not to exceed two adults (six months or older) in number and any combination, for each dwelling unit.

(6) The following animals under the following conditions:

(a) Horses, not more than one for each acre of land.

(b) The keeping of domestic animals shall conform to all other provisions of law governing same. No animals or any pen or coop, stable or barn shall be kept or maintained within seventy-five feet (75') of any window or door of any residence, dwelling or other building used for human habitation, nor within forty feet (40') of any portion of a required yard space located on adjoining property if devoted to a use other than agriculture.

(7) Accessory living quarters may be maintained on any building site; provided, that such quarters shall be used as an accessory to the single dwelling unit.

(8) One additional kitchen may be maintained for accessory living quarters on a building site having an area of twenty thousand sq. ft. (20,000 sq. ft.) or more. Such facilities shall be for the use of servants, family members, or temporary guests of the occupant. Such accessory living quarters shall not be used a separate rental units for any period of time.

(9) Off-street automobile parking as an accessory use to any permitted use.

D. Standards for Development.

(1) Building Site Area Required.

(a) Minimum building site area shall be forty thousand sq. ft. (40,000 sq. ft.). *Exception:* All legal lots of record less than 40,000 sq. ft. as of (date of adoption).

(b) Required yards:

(1) Front yards – Five feet (5′) minimum.

(2) Rear yards – Five feet (5′) minimum.

(3) Interior side yard – Five feet (5′) minimum.

(4) Side yard adjacent to street – Five feet (5′) minimum.

(5) Structures, grading and overhand shall be prohibited within twenty feet (20′) of the top of and ten feet (10′) of the bottom of substantial slopes exceeding twenty-five percent (25%) grade and having a vertical rise of twenty feet (20′) or greater.

NOTE: The above setbacks are meant to be minimums and should only be allowed by the DRB when the environmental sensitivities (e.g. topography, vegetation, etc.) of the site so dictate. Otherwise, setbacks shall conform to the yards required in the R-1-10 zone.

(2) Floor Area/Lot Ratio.

The ratio of building floor area to lot area shall be no more than twenty five percent (25%) or three thousand five hundred sq. ft. (3500 sq. ft.), whichever is less.

———

EXHIBIT "A"

RELEASE OF NOTICE OF MERGER

The parcels which make up the land which were merged pursuant to the Notice of Merger recorded on April 28, 1977 in the Official Records of San Diego County at File/ Page No. 77-159862 and which are now, pursuant to the attached Release of Notice of Merger, unmerged into twenty (20) separate parcels are described as follows:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285 filed in the Office of County Recorder of San Diego County; and

Lots A and B in Block 37 and T and U in Block 12, together with that portion of "Gatun Street" lying southeasterly of the southwesterly prolongation of the northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to map thereof No. 1343 filed in the Office of County Recorder of San Diego County; and

Lots 780 through 785 inclusive, together with that portion of "Oribia Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6 in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592 filed in the Office of County Recorder of San Diego County.

EXHIBIT D

ARTICLES OF INCORPORATION

AND BY-LAWS

of the

DEL MAR CIVIC ASSOCIATION

Under the Laws of the State of California

[Document not reproduced in printing]

EXHIBIT E

INDEMNITY AGREEMENT

THIS AGREEMENT is made and entered into on ___, 1985, by and between the DEL MAR CIVIC ASSOCIATION, a non-profit California corporation, and the CITY OF DEL MAR, with administrative offices located at 1050 Camino Del Mar, Del Mar, California.

WITNESSETH

WHEREAS, the DEL MAR CIVIC ASSOCIATION is the owner of certain property more particularly described in Exhibit "A" attached hereto; and

WHEREAS, the DEL MAR CIVIC ASSOCIATION was incorporated as a non-profit corporation in 1938 for the purpose of accepting a gift of property and for regulating its use; and

WHEREAS, since that time the CITY OF DEL MAR has become a chartered municipality under the laws of the State of California; and

WHEREAS, the administrative function of regulating the use of the property owned by the DEL MAR CIVIC ASSOCIATION is now more appropriate for the CITY OF DEL MAR; and

WHEREAS, the DEL MAR CIVIC ASSOCIATION wishes to transfer and convey its interest in the property upon approval of the transfer and conveyance by the membership, and the CITY OF DEL MAR wishes to accept the transfer and conveyance of the interest in the property owned by the DEL MAR CIVIC ASSOCIATION; and

WHEREAS, it is the mutual desire of the parties to provide for the indemnification of the DEL MAR CIVIC ASSOCIATION with regard to that transfer and conveyance:

NOW, THEREFORE, the parties hereto agree as follows:

1. CITY OF DEL MAR agrees to and shall hold harmless, indemnify and defend the DEL MAR CIVIC ASSOCIATION, its present and past Board of Directors, officers, members, and agents from and against any and all obligations, claims, actions, losses, liabilities, costs and expenses, including attorney's fees and court costs, in connection with any liability, injury, damage or action resulting from or associated with any of the following:

a) The Membership vote approving the transfer of the property more particularly described in Exhibit "A" attached, and the transfer and conveyance of the property

owned by the Del Mar Civic Association to the City of Del Mar.

b) Any existing or future actions or proceedings with respect to any claim of right, title, interest or ownership including, but not limited to, actions involving prescriptive rights, adverse possession or quiet title with regard to the property described herein.

2. CITY OF DEL MAR expressly agrees to accept conveyance of the property subject to the covenants, conditions and restrictions contained in the Deed of Gift of the Property from the WM. G. KERCKHOFF COMPANY to the DEL MAR CIVIC ASSOCATION [sic] dated September 14, 1938.

3. CITY OF DEL MAR specifically agrees to defend actions or proceedings brought against the DEL MAR CIVIC ASSOCATION with respect to the matters embraced in this agreement. The costs of the defense against such claims, demands, or action against the DEL MAR CIVIC ASSOCIATION [sic] shall be paid by the CITY OF DEL MAR.

4. This instrument contains the entire agreement of the parties relating to the rights granted and obligations assumed in this instrument. Any oral representations or modifications concerning this instrument shall have no force or effect unless contained in a subsequent written modification signed by the parties hereto.

5. In the event that legal or equitable action is commenced to enforce any terms or provisions of this agreement, the prevailing party or parties shall be entitled to

recover their reasonable attorney's fees in addition to costs.

IN WITNESS WHEREOF, the parties hereto have hereunder set their hands as of the date first above written.

DEL MAR CIVIC ASSOCIATION CITY OF DEL MAR

By: _____ By: _____

FOR COURT USE ONLY 0378

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

TITLE OF CASE (Abbreviated)
SMITH v. THE CITY OF DEL MAR

ATTORNEY(S) NAME AND ADDRESS
HILLYER & IRWIN (Robert L. Zajac)
530 B St., 14th Flr.
San Diego CA 92101-4479

ATTORNEY(S) FOR:
Plaintiff

TELEPHONE:
619/234-6121

HEARING DATE-TIME-DEPT

CASE NUMBER
N38218

DECLARATION OF SERVICE BY MAIL

(Filed Nov. 14, 1988)

I, the undersigned declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am

employed in the County of San Diego, California,
(Residing/Employed)

in which county the within-mentioned mailing occurred.

My business address is 530 B Street, 14th Floor,
(Residence/Business) (No., Street)

San Diego, CA 92101-4479. I served the following
(City, State)

document(s) SECOND AMENDED COMPLAINT
(set forth exact title of documents(s))

---

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Roger Krauel, Esq.
Krauel & Krauel
225 Broadway, Ste. 1750
San Diego, CA 92101

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on 11-14 1988.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 11-14, 1988

/s/ Marilyn Armstead
(Signature)
MARILYN ARMSTEAD

PROOF OF SERVICE BY MAIL

(C.C.P. 1013a and 2015.5)
Form 9A Co. Clk. (Rev 7/82) LP 7-83

APPENDIX M

HILLYER & IRWIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
CALIFORNIA FIRST BANK BUILDING
530 B STREET – 14TH FLOOR
SAN DIEGO, CALIFORNIA 92101
TELEPHONE 234-6121
(Area Code 619)

8131.3
RLZ18
Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF
CALIFORNIA COUNTY OF SAN DIEGO,
NORTH COUNTY BRANCH

JAMES E. SMITH, Plaintiff, vs. THE CITY OF DEL MAR and DOES 1 through 100, inclusive, Defendants.	CASE NO. N 38218 FIRST AMENDED COMPLAINT (Filed Sept. 28, 1988)

Plaintiff alleges:

FIRST CAUSE OF ACTION

(Inverse Condemnation)

1. Plaintiff JAMES E. SMITH ("SMITH") is an individual residing in THE CITY OF DEL MAR, and is the owner in fee simple of 11 of the 20 separate parcels which are collectively known as the Snakewall Property, more particularly identified as:

> Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with that portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

Plaintiff has during 1987 and 1988 sold 9 of the 20 lots making up the Snakewall Property. During the time period between December 9, 1977, and August 20, 1987, SMITH owned all 20 of the above-referenced lots making up the Snakewall Property. The majority of the lots making up the Snakewall Property are nonconforming lots, as defined by the applicable zoning ordinances of THE CITY OF DEL MAR.

2. Defendant THE CITY OF DEL MAR is a municipal corporation in the State of California.

3. Defendants DOES 1 through 100, inclusive, whether, individual, corporate or otherwise, are fictitious names of Defendants whose true names are not at this time known to Plaintiff; Plaintiff is informed and believes and thereon alleges that each of said fictitiously named Defendants, whether individuals, partnerships, corporations or otherwise, are in some way liable or responsible to the Plaintiff on the facts hereinafter alleged and at such time as Defendants' true names become known to Plaintiff, Plaintiff will ask leave of this Court to amend this complaint to insert said true names.

4. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, including those designated as DOES 1 through 100, at all times herein mentioned were the agents, servants, and employees of the remaining Defendants, and as such, within the times mentioned herein were acting within the purpose, course and scope of such agency, service and employment, and with the consent, permission and ratification of the remaining Defendants.

5. THE CITY OF DEL MAR recorded a Notice of Merger in the Official Records of San Diego County on April 28, 1977. A true and correct copy of this Notice of Merger is attached hereto and incorporated herein as Exhibit "A." This Notice of Merger clouded title to the Snakewall property, reduced its market value, and prevented the sale of the above-referenced individual Snakewall lots from April 28, 1977 to the date a Release of Notice of Merger was recorded on October 9, 1985.

6. Prior to the recordation of the Notice of Merger, THE CITY OF DEL MAR rezoned the Snakewall Property to R1-40 which created 14 nonconforming lots within the Snakewall Property. This zoning change creating the nonconforming lots at the Snakewall Property was a prerequisite to the recordation of the Notice of Merger. Further information with regard to this Notice of Merger is provided by the City of Del Mar Memorandum of October 7, 1985, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "B."

7. Shortly after purchasing the property, and continuing thereafter, Petitioner SMITH made several repeated requests to THE CITY OF DEL MAR to release this Notice of Merger, as this Notice of Merger combined the 20 individual lots in the Snakewall Property into one lot. THE CITY OF DEL MAR repeatedly refused any and all requests by Petitioner SMITH to release this Notice of Merger.

8. In or about July, 1980, the pertinent Government Code Section by which THE CITY OF DEL MAR merged the individual Snakewall lots was revised so that any lots previously merged under that Section were deemed to be

unmerged. Despite this clear change in the statute, THE CITY OF DEL MAR refused thereafter to release this Notice of Merger until October 9, 1985. A true and correct copy of the release of this Notice of Merger is attached hereto and incorporated herein as Exhibit "C."

9. Despite repeated requests of Defendant SMITH to be compensated for the periods in which the CITY refused to release this Notice of Merger, THE CITY OF DEL MAR has repeatedly refused any and all requests to provide compensation to SMITH for preventing his selling the individual Snakewall lots and blocking development on the Snakewall Property.

10. Under the United States Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378 (1987), the above-referenced actions of THE CITY OF DEL MAR constitute a taking of all use of 18 of the 20 lots making up the Snakewall Property, for which Petitioner SMITH is entitled to full and complete compensation in an amount from THE CITY OF DEL MAR in excess of $2,000,000.00, said amount continuing to increase, or according to proof at trial. Plaintiff has received no compensation for the damage to his property caused by this taking by the above-referenced actions of THE CITY OF DEL MAR. Plaintiff has also suffered further consequential damages as a result of this Notice of Merger and other actions undertaken by THE CITY OF DEL MAR in relation to the Snakewall Property.

11. Plaintiff has incurred and will continue to incur attorneys' and appraisal fees because of this proceeding, in amounts that cannot yet be ascertained which are

recoverable in this action under Code of Civil Procedure section 1036.

SECOND CAUSE OF ACTION

(Declaratory Relief)

12. Plaintiff incorporates paragraphs 1 and 9 of his First Cause Action as if set forth in full herein.

13. An actual controversy has arisen and now exists between Plaintiff and Defendant THE CITY OF DEL MAR concerning the Del Mar Civic Association, a dissolved California nonprofit, mutual benefit corporation. Plaintiff SMITH alleges, and Defendant THE CITY OF DEL MAR disputes, that Plaintiff SMITH was deprived of his full and complete 20 votes in Del Mar Civic Association matters by the CITY's unilateral and arbitrary refusal to recognize 20 separate lots during the time period from 1977 to 1985 and prevented Petitioner SMITH from utilizing a full 20 votes in the Del Mar Civic Association. SMITH alleges that THE CITY OF DEL MAR failed to follow its Ordinance 246 with respect to the definition contained therein with respect to building sites, which impacted SMITH's rights in the Del Mar Civic Association matters as set forth in the Articles of Incorporation and Bylaws of the Del Mar Civic Association. As a result of THE CITY OF DEL MAR's unjustified refusal to recognize 20 separate lots, SMITH was prevented from fully participating in decisions made by the Del Mar Civic Association, and decisions made by the Del Mar Civic Association could have been altered through Plaintiff SMITH's full participation as owner of 20 separate lots. THE CITY OF DEL MAR disputes these contentions.

14. A true and correct copy of THE CITY OF DEL MAR's Ordinance No. 246 is attached hereto as Exhibit "D," and a true and correct copy of the Articles of Incorporation and Bylaws of the Del Mar Civic Association is attached hereto as Exhibit "E."

15. Plaintiff desires a judicial determination of his rights and duties, and a declaration as to whether THE CITY OF DEL MAR wrongfully interfered with a valid and existing property right with regard to the Del Mar Civic Association by refusing to recognize 20 separate lots at the Snakewall Property during the time above-referenced period.

16. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiff may ascertain his rights and duties which he was prevented from exercising through THE CITY OF DEL MAR's failure to recognize 20 separate lots at the Snakewall Property between 1977 and 1985 thereby affecting SMITH's voting rights in Del Mar Civic Association matters. Further, a judicial declaration is further necessary and appropriate at this time as the plaintiffs in *Norman Elliott, et al. v. Del Mar Civic Assoc., etc., et al,* San Diego Superior Court Case No. N29095, are attempting to void the results of the May 7, 1985, Del Mar Civic Association meeting at which the Del Mar Civic Association was dissolved and certain beachfront property transferred to THE CITY OF DEL MAR.

17. Through the actions of THE CITY OF DEL MAR refusing to recognize the 20 separate lots of the Snakewall Property, therefore affecting SMITH's voting rights

within the Del Mar Civic Association, Petitioner SMITH has been damaged in a sum according to proof at trial.

18. Additionally, SMITH is informed and believes that THE CITY OF DEL MAR and the Del Mar Civic Association entered into an Indemnity Agreement which in part provided that any Del Mar Civic Association member would be indemnified by THE CITY OF DEL MAR for all costs, including attorneys' fees, in any action from or associated with the membership vote at the above-referenced meeting which transferred certain beachfront property to THE CITY OF DEL MAR. SMITH is informed and believes that he is entitled to his attorneys' fees under this Indemnity Agreement and has incurred, and will continue to incur, attorneys' fees in prosecuting this cause of action. SMITH is informed and believes that a true and correct copy of this Indemnity Agreement is attached hereto and incorporated herein as Exhibit "F."

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION

1. For an amount in excess of $2,000,000.00 or according to proof at trial, with interest thereon at the legal rate from the date of the damages, said amount continuing to increase, for the damages incurred by SMITH by and through this taking;

2. For consequential damages according to proof for the actions undertaken by THE CITY OF DEL MAR which resulted in a taking; and

3. For reasonable attorneys' and appraisal fees according to proof.

ON THE SECOND CAUSE OF ACTION

1. For a declaration that THE CITY OF DEL MAR wrongfully interfered with SMITH's valid and existing property rights by refusing to recognize 20 separate lots in the Snakewall Property between 1977 and 1985, thereby affecting SMITH's voting rights in Del Mar Civic Association matters;

2. For an amount exceeding the jurisdictional limit of the Court, or according to proof at trial for the damages incurred by SMITH by THE CITY OF DEL MAR's interference with his above-referenced property right; and

3. For reasonable attorneys' fees on this cause of action based on the Indemnity Agreement between THE CITY OF DEL MAR and the Del Mar Civic Association.

ON ALL CAUSES OF ACTION

1. For costs of suit incurred herein; and

2. For such other and further relief as the Court deems just and proper.

DATED: September 28, 1988

HILLYER & IRWIN

By /s/ Robert L. Zajac
ROBERT L. ZAJAC
Attorneys for Plaintiff
JAMES E. SMITH

VERIFICATION

(CCP § 446)

I, JAMES E. SMITH, declare:

I am the plaintiff in the above-entitled action; I have read the foregoing First Amended Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of September, 1988, at San Diego, California.

/s/ James E. Smith
JAMES E. SMITH

[Exhibit A reproduced herein at
pages L-12 - L-14]

[Exhibit B reproduced herein at
pages Q-1 - Q-4]

[Exhibit C reproduced herein at
pages L-15 - L-17]

[Exhibit D reproduced herein at
pages L-18 - L-33]

[Exhibit E reproduced herein at
page L-34]

M-16

[Exhibit F reproduced herein at
pages L-34 - L-37]

APPENDIX N

HILLYER & IRWIN
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ATTORNEYS AT LAW
CALIFORNIA FIRST BANK BUILDING
530 B STREET – 14TH FLOOR
SAN DIEGO, CALIFORNIA 92101
TELEPHONE 234-6121
(Area Code 619)

8131.3
RLZ18
Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF
CALIFORNIA COUNTY OF SAN DIEGO,
NORTH COUNTY BRANCH

JAMES E. SMITH, Plaintiff, vs. THE CITY OF DEL MAR and DOES 1 through 100, inclusive, Defendants.	CASE NO. 38218 COMPLAINT FOR DECLARATORY RELIEF (C.C.P. § 1060) (Filed Sept. 18, 1987)

Plaintiff respectfully represents:

FIRST CAUSE OF ACTION

(Declaratory Relief)

1. Plaintiff JAMES E. SMITH ("SMITH") is an individual residing in THE CITY OF DEL MAR, and is the owner in fee simple of 19 of the 20 separate parcels which

are collectively known as the Snakewall Property, more particularly identified as:

> Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1284, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with that portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

Plaintiff SMITH, on August 20, 1987, sold Lot L in Block 12 of Arden Heights Unit No. 3, in THE CITY OF DEL MAR, in the County of San Diego, State of California, according to Map No. 1285 filed in the Office of the County Recorder of San Diego County. The majority of the lots making up the Snakewall Property are nonconforming lots, as defined by the applicable zoning ordinance of THE CITY OF DEL MAR.

2. Defendant THE CITY OF DEL MAR is a municipal corporation in the State of California.

3. Defendants DOES 1 through 100, inclusive, whether, individual, corporate or otherwise, are fictitious names of Defendants whose true names are not at this time known to Plaintiff; Plaintiff is informed and believes and thereon alleges that each of said fictitiously named Defendants, whether individuals, partnerships, corporations or otherwise, are in some way liable or responsible to the Plaintiff on the facts hereinafter alleged and at such time as Defendants' true names become known to Plaintiff, Plaintiff will ask leave of this Court to amend this complaint to insert said true names.

4. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, including those designated as DOES 1 through 100, at all times herein mentioned were the agents, servants, and employees of the remaining Defendants, and as such, within the times mentioned herein were acting within the purpose, course and scope of such agency, service and employment, and with the consent, permission and ratification of the remaining Defendants.

5. An actual controversy has arisen and now exists between SMITH and THE CITY OF DEL MAR concerning the zoning of the Snakewall Property and a Notice of Merger which clouded the title to the Snakewall Property from April 28, 1977 through October 9, 1985, as well as THE CITY OF DEL MAR's failure to implement development standards for nonconforming lots. SMITH contends that these factors prevented and/or impacted the development of the Snakewall Property. Defendant THE CITY

OF DEL MAR disputes these contentions and contends that SMITH was not harmed by the Notice of Merger from April 28, 1977 through October 9, 1985, and that SMITH has not been harmed by the zoning of the Snakewall Property, or by THE CITY OF DEL MAR's failure to implement development standards for nonconforming lots.

6. This Notice of Merger was recorded on the Snakewall Property on April 28, 1977. Prior to the recordation of the Notice of Merger, THE CITY OF DEL MAR rezoned the Snakewall Property to R1-40 which created 14 nonconforming lots within the Snakewall Property. Additionally, THE CITY OF DEL MAR created the bluff, slope and canyon overlay and open space overlay zones and imposed them on the Snakewall Property. The zoning change to the Snakewall Property was a prerequisite to the recordation of the Notice of Merger.

7. Shortly after purchasing the property, Petitioner SMITH made several repeated requests to THE CITY OF DEL MAR to release this Notice of Merger, as this notice of merger combined the 20 separate lots in the Snakewall Property into one lot. THE CITY OF DEL MAR repeatedly refused any and all requests by Petitioner SMITH to release this Notice of Merger. A true and correct copy of this Notice of Merger is attached hereto and incorporated herein as Exhibit "A".

8. THE CITY OF Del Mar failed and refused to release this Notice of Merger until October 9, 1985. A true and correct copy of the release of this Notice of Merger is attached hereto and incorporated herein as Exhibit "B".

9. Despite repeated requests of Defendant SMITH to be compensated for the periods in which the CITY refused to release this Notice of Merger, THE CITY OF DEL MAR has repeatedly refused any and all requests to provide compensation to SMITH for preventing development on the Snakewall Property, and has further resisted any and all attempts by SMITH to rezone the Snakewall Property, and has further failed to implement development standards for nonconforming lots.

10. Under the United States Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* ___ U.S. ___, 55 U.S.L.W. 4781 (1987), the above-referenced actions of THE CITY OF DEL MAR constitute a taking of all use of 18 of the 20 lots making up the Snakewall Property, for which Petitioner SMITH is entitled to full and complete compensation in an amount from THE CITY OF DEL MAR in excess of $2,000,000.00, said amount continuing to increase, or according to proof at trial.

SECOND CAUSE OF ACTION

(Declaratory Relief)

11. Plaintiff incorporates paragraphs 1 and 4 of his First Cause Action as if set forth in full herein.

12. An actual controversy has arisen and now exists between Plaintiff and Defendant THE CITY OF DEL MAR concerning the Del Mar Civic Association, a dissolved California non-profit, mutual benefit corporation. Plaintiff SMITH alleges, and Defendant THE CITY OF DEL MAR disputes, that Plaintiff SMITH was deprived of his

full and complete 20 votes in Del Mar Civic Association matters by the CITY's unilateral and arbitrary refusal to recognize 20 separate lots during the time period from 1977 to 1985 and prevented Petitioner SMITH from utilizing a full 20 votes in the Del Mar Civic Association. SMITH alleges that THE CITY OF DEL MAR failed to follow its Ordinance 246 with respect to the definition contained therein with respect to building sites, which impacted SMITH's rights in the Del Mar Civic Association matters as set forth in the Articles of Incorporation and Bylaws of the Del Mar Civic Association. As a result of THE CITY OF DEL MAR's unjustified refusal to recognize 20 separate lots, SMITH was prevented from fully participating in decisions made by the Del Mar Civic Association, and decision made by the Del Mar Civic Association could have been altered through Plaintiff SMITH's full participation as owner of 20 separate lots. THE CITY OF DEL MAR disputes these contentions.

13. A true and correct copy of THE CITY OF DEL MAR's Ordinance No. 246 is attached hereto as Exhibit "C," and a true and correct copy of the Articles of Incorporation and Bylaws of the Del Mar Civic Association is attached hereto as Exhibit "D."

14. Plaintiff desires a judicial determination of his rights and duties, and a declaration as to whether THE CITY OF DEL MAR wrongfully interfered with a valid and existing property right with regard to the Del Mar Civic Association by refusing to recognize 20 separate lots at the Snakewall Property during the time above-referenced period.

15. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiff may ascertain his rights and duties which he was prevented from exercising through THE CITY OF DEL MAR's failure to recognize 20 separate lots at the Snakewall Property between 1977 and 1985 thereby affecting SMITH's voting rights in Del Mar Civic Association matters. Further, a judicial declaration is further necessary and appropriate at this time as the plaintiffs in *Norman Elliott, et al. v. Del Mar Civic Assoc., etc., et al,* San Diego Superior Court Case No. N29095, are attempting to void the results of the May 7, 1985 Del Mar Civic Association meeting at which the Del Mar Civic Association was dissolved and certain beachfront property transferred to THE CITY OF DEL MAR.

16. Through the actions of THE CITY OF DEL MAR refusing to recognize the 20 separate lots of the Snakewall Property, therefore affecting SMITH's voting rights within the Del Mar Civic Association, Petitioner SMITH has been damaged in a sum according to proof at trial.

17. Additionally, SMITH is informed and believes that THE CITY OF DEL MAR and the Del Mar Civic Association entered into an Indemnity Agreement which in part provided that any Del Mar Civic Association member would be indemnified by THE CITY OF DEL MAR for all costs, including attorneys' fees, in any action from or associated with the membership vote at the above-referenced meeting which transferred certain beachfront property to THE CITY OF DEL MAR. SMITH is informed and believes that he is entitled to his attorneys' fees under this Indemnity Agreement and has incurred, and will continue to incur, attorneys' fees in

prosecuting this cause of action. SMITH is informed and believes that a true and correct copy of this Indemnity Agreement is attached hereto and incorporated herein as Exhibit "E."

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION

1. For a declaration that THE CITY OF DEL MAR's unjustifiably retaining during the above-referenced time period the Notice of Merger on the Snakewall Property after repeated attempts by SMITH to have this Notice of Merger released, THE CITY OF DEL MAR's resistance to all efforts by SMITH to rezone the Snakewall Property, and THE CITY OF DEL MAR's failure to implement development standards for nonconforming lots constitute a taking of the property; and

2. For an amount in excess of $2,000,000.00, said amount continuing to increase, or according to proof at trial, for the damages incurred by SMITH by and through this taking.

ON THE SECOND CAUSE OF ACTION

1. For a declaration that THE CITY OF DEL MAR wrongfully interfered with SMITH's valid and existing property rights by refusing to recognize 20 separate lots in the Snakewall Property between 1977 and 1985, thereby affecting MR. SMITH's voting rights in Del Mar Civic Association matters;

2. For an amount exceeding the jurisdictional limit of the Court, or according to proof at trial for the damages incurred by SMITH by THE CITY OF DEL MAR's interference with his above-referenced property right; and

3. For reasonable attorneys' fees on this cause of action based on the Indemnity Agreement between THE CITY OF DEL MAR and the Del Mar Civic Association.

ON ALL CAUSES OF ACTION

1. For costs of suit incurred herein; and

2. For such other and further relief as the Court deems just and proper.

DATED: September 18, 1987 HILLYER & IRWIN

By /s/ Robert L. Zajac
ROBERT L. ZAJAC
Attorneys for Plaintiff
JAMES E. SMITH

VERIFICATION

(C.C.P. §446)

I, JAMES E. SMITH, declare:

I am the plaintiff in the above-entitled action, and have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are herein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this verification is executed at San Diego, California, on September 18, 1987.

/s/ James E. Smith
JAMES E. SMITH

[Exhibit A reproduced herein
at pages L-12 - L-14]

[Exhibit B reproduced herein
at pages L-15 - L-17]

[Exhibit C reproduced herein
at pages L-18 - L-33]

[Exhibit D reproduced herein
at page L-34]

[Exhibit E reproduced herein
at pages L-34 - L-37]

APPENDIX O

Christensen Engineers
444 West "C" Street, Suite 400
San Diego, California 92101
(619) 232-7891

Batch Lot Listing

02/01/88
SUBJECT FILE = 7411
BCH LOT FILE = 7414B

BLOCK 1 LOT A TO BLOCK MAP LOT B002

********** BLOCK 1 **********

####### LOT A OF BLOCK 1 ##########
LOT AREA= 24421.848 SQ FT OR 0.56065 ACRES

####### LOT B OF BLOCK 1 ##########
LOT AREA= 4817.975 SQ FT OR 0.11061 ACRES

####### LOT G OF BLOCK 1 ##########
LOT AREA= 33358.236 SQ FT OR 0.76580 ACRES

####### LOT H OF BLOCK 1 ##########
LOT AREA= 20146.551 SQ FT OR 0.46250 ACRES

####### LOT I OF BLOCK 1 ##########
LOT AREA= 16997.199 SQ FT OR 0.39020 ACRES

####### LOT J OF BLOCK 1 ##########
LOT AREA= 35380.094 SQ FT OR 0.81222 ACRES

####### LOT K OF BLOCK 1 ##########
LOT AREA= 11245.079 SQ FT OR 0.25815 ACRES

####### LOT L OF BLOCK 1 ##########
LOT AREA= 15415.910 SQ FT OR 0.35390 ACRES

####### LOT M OF BLOCK 1 ##########
LOT AREA= 11677.306 SQ FT OR 0.26807 ACRES

####### LOT N OF BLOCK 1 ##########
LOT AREA= 35358.507 SQ FT OR 0.81172 ACRES

####### LOT	O OF BLOCK	1 ##########
LOT AREA=	49968.976 SQ FT OR	1.14713 ACRES
####### LOT	S OF BLOCK	1 ##########
LOT AREA=	14335.196 SQ FT OR	0.32909 ACRES
####### LOT	T OF BLOCK	1 ##########
LOT AREA=	33120.607 SQ FT OR	0.76034 ACRES
####### LOT	U OF BLOCK	1 ##########
LOT AREA=	19418.666 SQ FT OR	0.44579 ACRES
###### ROAD	$2ALL OF BLOCK	1 ##########
ROAD AREA=	16631.282 SQ FT OR	0.38180 ACRES
LOT SUM=	325662.151 SQ FT OR	7.47617 ACRES
**********	BLOCK	2 **********
####### LOT	780 OF BLOCK	2 ##########
LOT AREA=	79965.393 SQ FT OR	1.83575 ACRES
####### LOT	781 OF BLOCK	2 ##########
LOT AREA=	61170.197 SQ FT OR	1.40427 ACRES
####### LOT	782 OF BLOCK	2 ##########
LOT AREA=	65262.534 SQ FT OR	1.49822 ACRES
####### LOT	783 OF BLOCK	2 ##########
LOT AREA=	116914.952 SQ FT OR	2.68400 ACRES
####### LOT	784 OF BLOCK	2 ##########
LOT AREA=	112133.163 SQ FT OR	2.57422 ACRES
####### LOT	785 OF BLOCK	2 ##########
LOT AREA=	43399.808 SQ FT OR	0.99632 ACRES
###### ROAD	SORT OF BLOCK	2 ##########
ROAD AREA=	37231.724 SQ FT OR	0.85472 ACRES
LOT SUM=	478846.046 SQ FT OR	10.99279 ACRES

**********	BLOCK	MAP **********
##### BNDRY BNDRY	#BDY OF BLOCK	MAP #######
AREA=	858371.203 SQ FT OR	19.70549 ACRES
#### C/L RD C/L RD	#B001 OF BLOCK	MAP #######
AREA=	260514.337 SQ FT OR	5.98059 ACRES
#### C/L RD C/L RD	#B002 OF BLOCK	MAP #######
AREA=	596280.682 SQ FT OR	13.68872 ACRES
LOT SUM=	0.000 SQ FT OR	0.00000 ACRES
	AREA TOTALS	
BOUNDARY	858371.203 SQ FT OR	19.70549 ACRES
ROAD	53863.006 SQ FT OR	1.23652 ACRES
C/L RD	856795.019 SQ FT OR	19.66931 ACRES
LOTS	804508.197 SQ FT OR	18.46897 ACRES
TOTAL R+O+L	858371.203 SQ FT OR	19.70549 ACRES
TOTAL B-(R+O+L	0.000 SQ FT OR	0.00000 ACRES

APPENDIX P

Plaintiff's Exhibit 53

city of del mar

DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

July 15, 1986

Robert L. Zajac
Hillyer and Irwin
530 B Street, 14th Floor
San Diego, CA 92101-4479

Re: Snakewall Property

Dear Mr. Zajac:

As we discussed, the City has determined that the Snakewall Property was legally subdivided in the early 1900's. These lots are considered to be legal lots of record, and are potentially buildable, subject to final review by the Department of Planning and Community Development. Some of the lots may have easement access difficulties, so individuals interested in acquiring these properties should thoroughly investigate the sites and the access.

The lots which now can be validly sold are the following:

(1) Arden Heights #3, Map #1285, recorded September 22, 1910, which sets forth Lots G, H, I, J, K, L, M, N, O, and S.

(2) Arden Heights #4, Map 1343, recorded June 8, 1911, which sets forth Lots A, B, T, and U.

(3) Arden Heights #6, Map 1592, recorded July 18, 1913, which sets forth Lots 780, 781, 782, 783, 784, and 785.

Sincerely,

/s/ Lise Strandgaard
LISE STRANDGAARD
Director of Planning
and Community Development

APPENDIX Q

Plaintiff's Exhibit 79

city of del mar

memorandum

To: City Council Date: October 7, 1985

From: Department of Planning & Community Development

Subject: Snake Wall Property, Release of Notice of Merger

RECOMMENDATION

The Department of Planning & Community Development recommends that the City Council authorize the City Manager to execute the attached release of Notice of Merger.

DISCUSSION

At its Regular Meeting of February 7, 1977, the Del Mar City Council reviewed the status of the property in Del Mar generally bounded by San Dieguito Drive, Zapo Street and Serpentine Drive and colloquially known as "The Snake Wall Property." The City Council found, pursuant to California Government Code Section 66424.2, (April 1977) that all parcels identified in said "Snake Wall property" had merged into one continuous parcel based on the following findings:

1) All parcels included in said property are contiguous parcels and have common ownership;

2) At least one parcel included in said property does not conform to the City's standards for

minimum parcel size to permit use or development under the City's R-1-40 zoning for the area.

3) At least one parcel in said property is not developed with a building for which a permit has been issued.

The City Council merged the Snake Wall property based on a Staff recommendation that some of the lots did not meet the 40,000 square foot size and the minimum width and depth requirements imposed by the R-1-40 overlay zone. In its original action in 1977, the Council made a determination that the parcels had merged because at least one was of substandard size. Thereafter, on February 10, 1977, a letter was sent to the property owners (Home Business Development Corporation) notifying them that merger had occurred.

The property owners did not oppose the merger and it was recorded with the San Diego County recorder's Office on April 28, 1977. Later, when James Smith bought the property, he was aware that the property had been merged into one parcel by the City Council. James Smith has recently requested that the Staff review the original merger and that the City Council release the Notice of Merger.

Where more than two lots are contiguous and in common ownership, the Attorney General has held that all parcels will merge when merger criteria are present. However, this leaves open the question of multiple, contiguous lots, where only one or two are substandard. Do all lots merge into one, or its the substandard lot only merged? It is Staff's interpretation that the merger doctrine does not apply unless the parcels in question are sub-standard

under current zoning or other local ordinances. Only if the parcels in question are sub-standard, and other required criteria are made, merger is required by law.

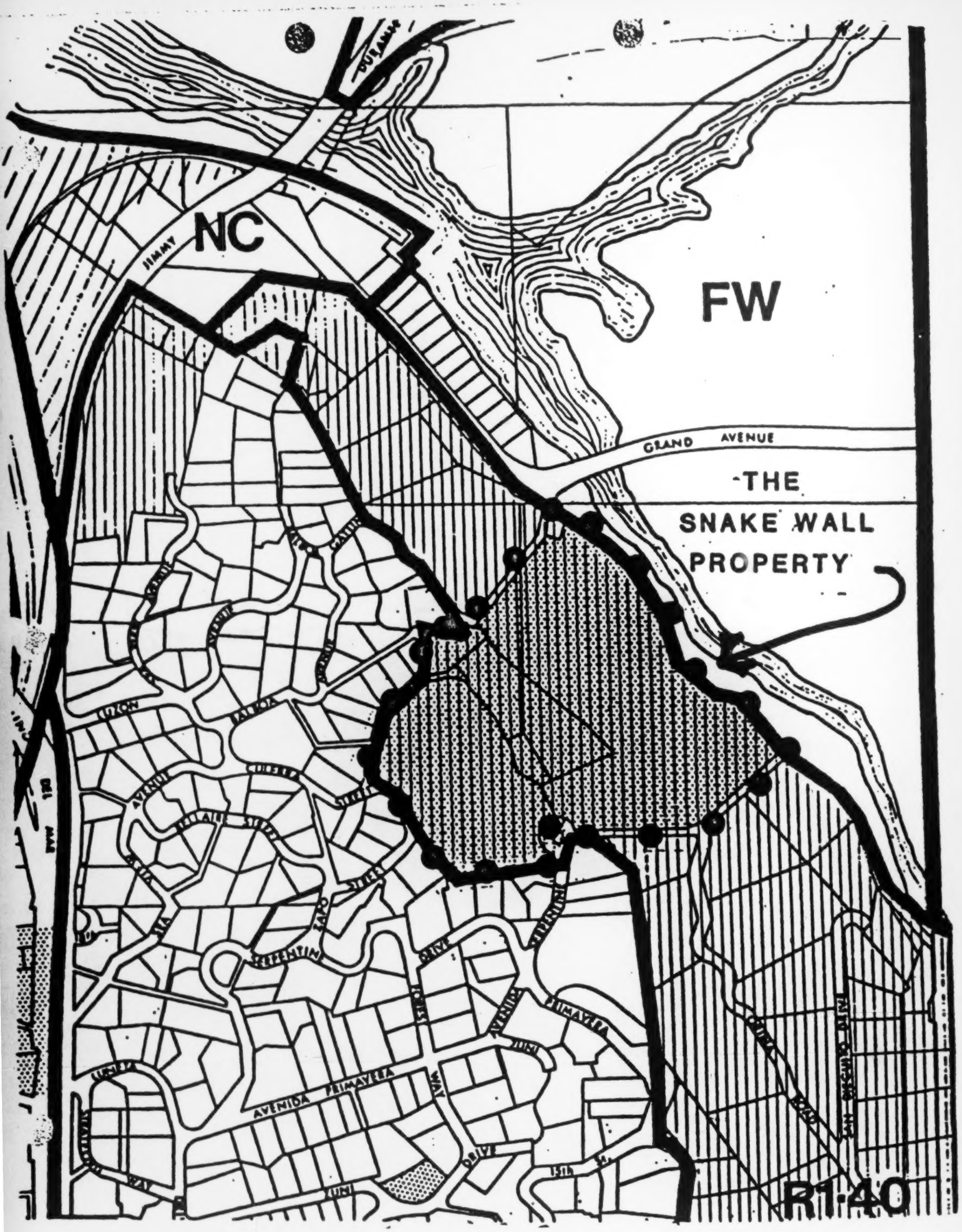
CONCLUSION

Staff feels that it appears appropriate to now release the Notice of Merger filed on April 28, 1977.

Respectfully submitted,

/s/ Lise Strandgaard
LISE STRANDGAARD
Director of Planning
and Community Development

LS:bjr


NC
FW
GRAND AVENUE
THE
SNAKE WALL
PROPERTY
JIMMY
COZON
AVENIDA PRIMAVERA
R1-40

Q-4

APPENDIX R

PLAINTIFF'S EXHIBIT 51

HILLYER & IRWIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
CALIFORNIA FIRST BANK BUILDING
530 B STREET – 14TH FLOOR
SAN DIEGO, CALIFORNIA 92101-4479

TELEPHONE 234-6121
(AREA CODE 619)

[Names on letterhead omitted in printing]

July 19, 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Roger Krauel, Esq.
DEL MAR CITY ATTORNEY'S OFFICE
1050 Camino Del Mar
Del Mar, California 92014

Re: Snakewall Property

Dear Mr. Krauel:

We represent James E. Smith with regard to property owned by him in the City of Del Mar commonly called the Snakewall property.

On July 10, 1985, Lise Strandgaard informed me that no ordinance has been enacted by the City of Del Mar merging the individual parcels of the Snakewall property, and also that no general ordinances were enacted by the City of Del Mar which would have had the effect of

merging the individual parcels in the Snakewall property. Please refer to my letter of July 10, 1985, confirming my phone conversation of that date with Lise Strandgaard; a copy of this letter was previously sent to you.

It is our firm belief that under the applicable California statutes, the Snakewall property has become unmerged, and now consists of 20 individual parcels. To show why this property has become unmerged, we will trace the applicable California statutes from the time the property was deemed merged, to the present date.

The statutes of California of 1976, Chapter 928, added Government Code § 66424.2 to the Government Code. Government Code § 66424.2 provided that if any one contiguous parcel or units held by the same owner did not conform to the standards for minimum parcel size for development under a zoning, subdivision, or other ordinance of a local agency, and that if at least one of these contiguous parcels was not developed with a building for which a permit had been issued, then such parcels shall be merged. To accomplish such a merger, Government Code § 66424.2 provided that a local agency must give notice 30 days prior to the recording of a notice of merger to the owner of such parcels, and shall also advise the owner of the time, date, and place of a hearing at which the owner may present evidence why such notice should not be recorded. It appears that Del Mar fully complied with the requirements of the then existing Government Code § 66424.2 when it recorded the Notice of Merger of the Snakewall property on April 28, 1977.

However, the Government Code § 66424.2 has undergone a number of revisions. Effective July 7, 1977, Government Code § 66424.2 was amended to read that a local agency may, by ordinance, merge contiguous parcels only if one of the contiguous parcels held by the same owner does not conform to minimum parcel size under the existing zoning or subdivision laws, and if one of these contiguous parcels was not developed with a building for which a building permit had issued. Thus, this amendment to Government Code § 66424.2 ended the merger by operation of law provision found in the original Government Code § 66424.2. The newly amended Government Code § 66424.2 also provided: "A local agency may, by ordinance, deem any or all parcels or units or lands which merged prior to the effective date of the 1977 amendments for the Section, unmerged and separate parcels."

Further, in July of 1980, the Government Code § 66424.2 was amended once again. Chapter 403 of the Statutes of California divided § 66424.2 into subdivisions (a), (b) and (c). Subdivision (a) of § 66424.2 set forth the earlier requirement that a local agency, may by ordinance, provide that if one of any such contiguous parcels held by the same owner does not conform to the minimum parcel size to permit development under a zoning or subdivision ordinance and that one of these contiguous parcels is not developed with the building for which a building permit has issued, then the local agency may merge those parcels. However, and more importantly for our purposes, subdivision (b) of § 66424.2 states:

> Any parcels which merged by operation of a law prior to the enactment of a local ordinance

> adopted pursuant to the provisions of subdivision (a) are hereby deemed to be unmerged without compliance with the requirements of this division.

Subsequent to this amendment, Chapter 1217 of the Statutes of California of 1980 also amended Government Code § 66424.2. This new amendment kept the previous language of the newly enacted (a) and (c) subdivisions of Government Code § 66424.2 as found in Chapter 403 of the Statutes of 1980, but amended the wording found in subdivision (b). The newe subdivision (b) reads:

> Any parcels which merged by operation of the law and which have not been deemed merged pursuant to a local ordinance adopted pursuant to subdivision (a), are hereby deemed to be unmerged without compliance with the requirements of this division.

These amendments to Government Code § 66424.2 show that if a local agency such as the City of Del Mar fails to merge property pursuant to a local ordinance under the guidelines of Government Code § 66424.2(a), then such parcels which previously merged by operation of law have become unmerged. As you know, no ordinances merging the Snakewall property have been enacted. Rather, the Snakewall property was merged pursuant to the original version of § 66424.2, which provided for merger by operation of law. As such, under this analysis, the Snakewall property is now unmerged and consists of the 20 individual parcels as originally subdivided.

Finally, in 1983, Chapter 845 of the Statutes of California of 1983 repealed Government Code § 66424.2. In its

place, Chapter 845 provided for a new statutory scheme for merging parcels, commencing with Government Code § 66451.10, *et seq.* However, most importantly for our purposes is Section 4 of Chapter 845. This section provides:

> *The repeal of subdivision (b) of § 66424.2, by Section 1 of this act, shall not be construed to affect the status of any parcel deemed unmerged pursuant to that subdivision. Any parcel unmerged pursuant to that subdivision, and which has not subsequently been merged, shall for the purpose of this act be considered a separate parcel.* [Emphasis added]

As such, it is our firm belief that under prior Government Code § 66424.2(b) the present parcels making up the Snakewall property were unmerged. Further, the newly enacted Government Code provisions relating to mergers of parcels have, by express provision, had no impact on the status of parcels unmerged by § 66424.2(b). Thus, on behalf of our client, James E. Smith, we respectfully request that the City of Del Mar file and record a Release of the Notice of Merger which the City of Del Mar previously recorded merging the Snakewall property on April 28, 1977. We further request that this be done at your earliest convenience. Please be advised that if evidence of the filing and recording of this Release of Notice of Merger is not forwarded to the undersigned within two weeks of your receipt of this letter, we will take all appropriate legal actions.

Should you have any questions about the foregoing, please contact me at your convenience.

Sincerely,

HILLYER & IRWIN

/s/ Robert L. Zajac
Brown B. Smith
Robert L. Zajac

RLZ:lg

cc: James E. Smith
Lise Strandgaard, Planning Director
Diane Lennert, City Clerk
[Certified Receipt dated 7-22-85 omitted in printing]

APPENDIX S

PLAINTIFF'S EXHIBIT 12

MINUTES
Meetings of the Board of Directors
Del Mar Civic Association
May 7, 1985

Meeting convened at 5:45 p.m. at St. Peter's Church, prior to members' Special and Annual Meeting. Present: Clark Almgren, Gordon Denyes, Larry Fletcher, Connie Geritz, Rosanne Holliday, Chuck Newton, Stephanie Tarkington.

Discussion of number of votes at members' meeting to be allocated to Jim Smith for so-called "Snakewall" property. Denyes said the City did not wish to provide a formal opinion on the number of residences which would presently be permitted on the property. However, City's staff had provided copies of a letter to Smith, dated Sept. 16, 1982, notifying Smith that the City was unable to revoke its action of April, 1977, merging the Snakewall lots. The letter stated that the lots which were merged would have been "extremely difficult if not impossible to utilize for development" since the lots were "extremely steep, poorly designed, without access, etc." The City's letter enclosed an appraisal report from the Keith W. Brownell Co., Inc., La Jolla, which stated in part: "It is highly improbable that the subject land could receive all necessary approvals in the foreseeable future for development of 20 lots" and noted the Notice of Merger recorded April 28, 1977, "which merges the parcels into one contiguous parcel, and thereby negates the old map."

Almgren suggested that perhaps some number of votes between 1 and 20 could be allocated to Smith, since the

City's letter said the land could be re-subdivided if Smith chose to do so. Holliday was opposed, asking what about other members with property which "could" be subdivided. Tarkington said Smith had given Board impression he had no knowledge of the merger, but now it was clear that he did have such knowledge. Fletcher said Smith could re-subdivide perhaps into 20 or even more lots; and that his map was divided into 20 lots in 1938.

Motion by Newton, second by Holliday: To retain the one vote previously granted Smith, and to refund the $40 fee he had submitted, less $1.00 in dues for one property. Approved 5-2 (Almgren and Fletcher voting nay).

Meeting was adjourned until after the Special and Annual meeting. At this juncture Phyllis Dunlap, an employee of the law firm representing plaintiffs, served members with the legal papers connected with appeal of the lawsuit.

The Board meeting was reconvened following the members' meeting.

Motion by Geritz, second by Holliday: That the Del Mar Civic Association transfer its land to the City of Del Mar, as a consequence of members having voted in favor of such transfer. Approved 6-1 (Fletcher voting nay).

Motion by Almgren, second by Holliday: Board authorized Denyes and Newton to sign deed transferring the Assn's. land to the City. Approved 6-1 (Fletcher voting nay).

Motion by Newton, second by Almgren: Board authorizes Denyes to sign indemnity agreement between Assn. and City. Approved unanimously.

Denyes said Rob Martin would research procedures for dissolving the Assn. and that *Board will meet Thursday, May 16, 7:30, at Denyes' home* to work out dissolution and other housekeeping details.*

(Denyes and Newton signed the documents, with Bob Nelson signing the indemnity agreement for the City, on May 8. The deed was recorded by the City on May 9.)

/s/ Charles T. Newton
Charles T. Newton
Secretary

cc: Rob Martin
Bob Nelson, City Manager, City of Del Mar

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* Please bring an itemized list of all your Assn. expenses, separated for those pertaining to costs associated with transfer of land to the City.

APPENDIX T

PLAINTIFF'S EXHIBIT 36

September 16, 1982

Mr. James E. Smith
P.O. Box 76
Niangway, Missouri 65713

Re: La Atayala

Dear Mr. Smith:

I forwarded copies of your correspondence to me, dated August 18, 1982 to the Del Mar City Council for review. The City Council directed that I review your request and assist you in every way possible within the bounds of the law.

As you know, the "Notice of Merger" which you reference in your correspondence was recorded in April of 1977, prior to the time that you purchased La Atayala. What you may not know, is that the City was compelled to record this Notice as it did by State law.

In April of 1977, California government Code § 66424.2 (State Law) compelled the City to record the subject Notice of Merger. In compliance with its duties under State law, the City gave the owners at the time notice of the proposed merger and a public hearing was held. Thereafter, in fulfillment of its duties under State law, the City recorded the Notice of Merger. There is simply no way that the City can now go back in time more than five years and "undo" that which it was compelled to do by State law.

Although the City cannot lift the Notice of Merger, I would point out that the 1977 merger has little, if any,

impact on the value or developability of your property. Because this merger has been a matter of record since 1977, both your own appraisal and the City's appraisal of the value of the property, were based upon its merged status. More importantly, the pre-1977 lots which were "merged" probably contributed little to value because they would have been extremely difficult if not impossible to utilize for development. Most of these lots were extremely steep, poorly designed, without access, etc.

I have briefly reviewed this matter with our City Planning Director, Bill Healy, who advises me that La Atayala appears to be subdividable under current City regulations. Thus, to the extent that subdivision can contribute to the value of your property, it can take place today. Even if the property had never been merged, resubdivision would have been virtually inevitable to convert the unusable lots to usable lots. Either way, the process and result would be substantially similar. For these reasons, the merger appears to have only relatively insignificant impacts on your property.

I would strongly recommend that you take the time to contact Planning Director Healy and review these development questions further with him. I am certain

you will find him informed and helpful. If I can assist you any further, please do not hesitate to contact me.

Sincerely,

/s/ D. Dwight Worden
D. Dwight Worden
City Attorney

DDW/dth

cc: Bill Healy, Planing Director
City Manager
City Council

APPENDIX U

PLAINTIFF'S EXHIBIT 33

August 10, 1982

RETURN RECEIPT REQUESTED

Mr. James E. Smith
P. O. Box 76
Niangwa, Missouri 65713

Re: La Atalaya

Dear Mr. Smith:

The Del Mar City Council has requested that I respond to your letter of July 23, 1982. Your letter was discussed at the August 2, 1982 meeting of the Del Mar City Council which was the first time the Council had an opportunity to review it.

The City Council asked that I convey their sincere appreciation to you for having offered the City a first chance to purchase La Atalaya. However, the appraisal which you had commissioned was very informative and, unfortunately, the City simply does not have the means to pay fair market value for the property. Although the City cannot purchase the property, Council and staff were very impressed by some of the concepts for development of the property which Mr. Larry Kallet presented to us on your behalf.

With regard to your expressed concern over a "cloud" on your title, the City Council expressly directed me to confirm to you in writing that the City has no present intention of acquiring La Atalaya. If this written confirmation from me is insufficient to remove the "cloud" which you perceive

having arisen due to discussion of a possible City acquisition, please let me know what further documentation we can provide you and it will be forthcoming promptly.

With regard to your expressed concern regarding development under the R-1-40 zoning applicable to La Atalaya, please be advised that this zoning does not, per se, prevent development of your property. To the contrary, there are a variety of development scenrios [sic] which could take place on the property, including some of those addressed in your appraisal and the City's appraisal. The City Planning Department stands ready to advise you or your representatives in more detail if you so desire regarding the development potential of your property under current zoning.

Finally, I am returning herewith your MAI Appraisal Report per your request. I hope the fact that it has been retained in my office has not caused you undue concern. The reason that I suggested to Mr. Kallet, and he agreed, that the report should be kept in my office was out of courtesy to you. If the report were made a "public record" at City Hall, it would be available for inspection by any member of the public or the media. It was the Council's and my own feeling that we should not subject your appraisal report to this public scrutiny without your prior approval. Therefore, it was determined that the report should be kept in my office pending further word from you so that it could be kept confidential. Whether or not you choose to make the report public is, of course, a matter up to your sole discretion.

I trust that this letter adequately addresses your concerns. If there is anything further, please do not hesitate

to contact me. I trust that the commencement of litigation will not be necessary as the City stands ready to accommodate you in any reasonable manner.

Sincerely,

/s/ D. Dwight Worden
City Attorney

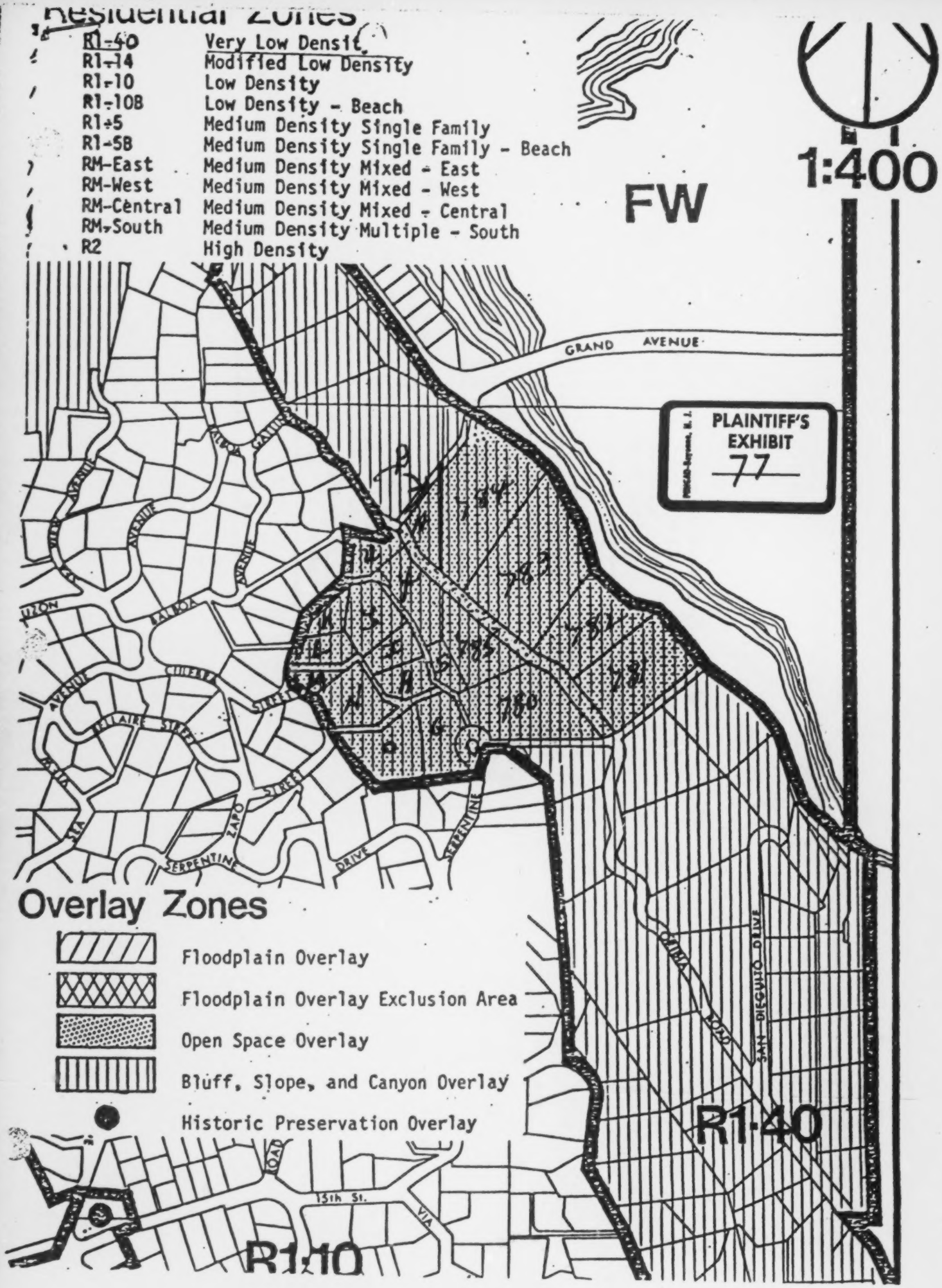
DDW/dth

Enclosure

cc: Del Mar City Council
(w/o Enclosure)

Del Mar City Manager
(w/o Enclosure)

P.S. A self addressed stamped envelope is enclosed herewith for your convenience in returning the receipt which is attached to this letter. Thank you for your cooperation.



BEST AVAILABLE COPY

Property Development Standards for R1 Zones

Zone	Minimum Lot Size	Min. Required Street Frontage	Min. Lot Dimensions		Minimum Yard Dimensions				Building Height Limit (2)	Max. Permitted Floor Area Ratio (Includes Required Parking)	Max. Permitted Lot Coverage (% of Lot)
			Width	Depth	Front	Rear	Interior Side	Street Side			
R1-40	40,000 sq.ft.	20 feet	75 feet	100 feet	20 ft.	25 ft.	10 ft.	10 ft.	26 ft.	12 1/2% or 2000 sq.ft. whichever is greater	20% or 3000 sq.ft., whichever is greater
R1-14	14,000 sq.ft.	20 feet	75 feet	100 feet	20 ft.	25 ft.	7 1/2 ft.	10 ft.	26 ft.	25% or 2000 sq. ft., whichever is greater	35% or 3000 sq.ft., whichever is greater
R1-10	10,000 sq.ft.	20 feet	75 feet	100 feet	20 ft.	25 ft.	7 1/2 ft.	10 ft.	26 ft.	25% or 2000 sq.ft., whichever is greater	40% or 3000 sq.ft., whichever is greater
R1-10B	10,000 sq.ft.	20 feet	35 feet	100 feet	10 ft.	10 ft.	5 ft.(4)	10 ft.	26 ft.	30% or 2000 sq.ft., whichever is greater	45% or 3000 sq.ft., whichever is greater
R1-S	5,000 sq.ft.	20 feet	50 feet	90 feet	20 ft.	20 ft.	5 ft.	10 ft.	22 ft.	30% or 2000 sq. ft., whichever is greater	45% or 3000 sq.ft., whichever is greater
R1-SB(1)	5,000 sq.ft.	20 feet	50 feet	80 feet	10 ft. (3)	10 ft.	5 ft. (4)	10 ft.	26 ft.	55%	80%

Exceptions:

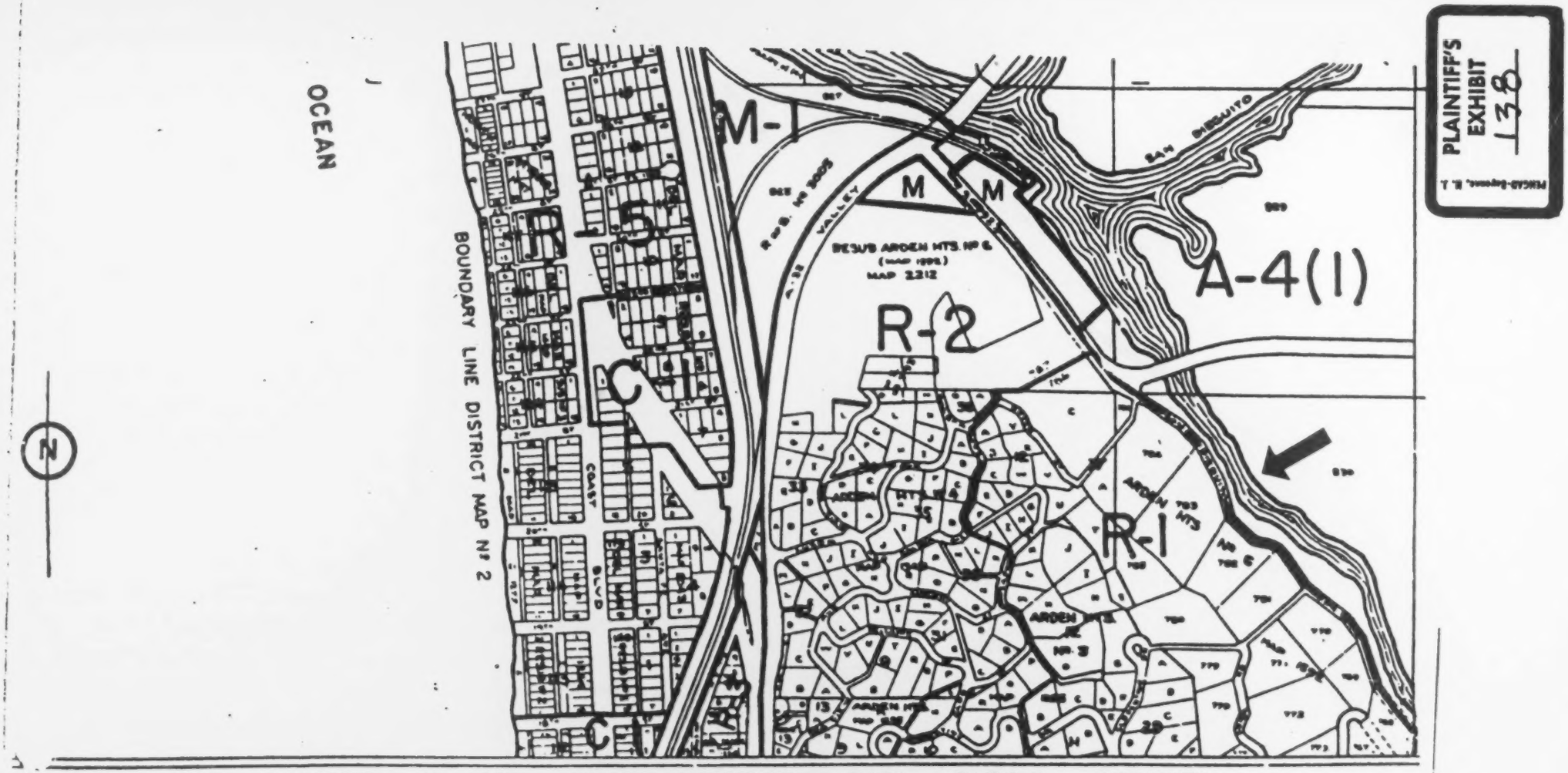
(1) In the R1-5B Zone, properties under common ownership and separated by a street or alley, when one or more such properties are of substandard lot size, shall jointly be considered as one building site for purposes of determining allowable floor area ratio and lot coverage.

(2) The building height limit for properties located within the Bluff, Slope and Canyon (BSC) Overlay Zone shall be fourteen feet unless specific findings are made pursuant to section 30-5.3.3 of the chapter which may permit a height limit up to, but not to exceed, the maximum height limit as specified herein.

(3) The minimum required front yard for properties located along the west side of Ocean Front in the R1-5B Zone shall be five feet.

(4) In the R1-10B and R1-5B Zones, a lot line building shall be permitted within the side yards when jointly and cooperatively requested by adjacent property owners, providing that the orientation of the dwellings to each other and the adjoining properties permits full and open access to light and air. When such a side yard lot line building is permitted, it will be restricted to one side yard of any one building site and the other opposite side yard shall have twice the normally required side yard dimension. A lot line building shall be permitted only for the first story portion of a one or two story building. A joint agreement between property owners requesting a lot line building shall be filed with the city clerk and recorded with the office of the county recorder prior to the construction of said lot line building. (Ord. No. 276, § 2.)

APPENDIX W



PLAINTIFF'S EXHIBIT 138

STRICT MAP NUMBER 2' DEL MAR SECTION SAN DIEGO COUNTY CALIFORNIA

SCALE 1" = 400'

Adopted by Resolution Jan. 11, 1957.
San Diego County Planning Commission.

Stuart Green
Chairman

Secretary

SHEET 3-F of 7 SHEETS

s map and all matters shown thereon are part of Ordinance 1402
v Series, as amended by Ordinance 1627 New Series adopted
the Board of Supervisors on February 11, 1957.

APPENDIX X

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, vs. JAMES E. SMITH, et al., Defendants. AND RELATED CROSS-ACTION	CASE NO. N 49451 ORDER FOR SALE OF DWELLING (Filed June 29, 1993) DATE: JUNE 1, 1993 TIME: 2:00 P.M. CTRM: DEPT. M JUDGE: MURPHY

This matter came before the court for decision on the motion of plaintiffs Margaret Roulette, S. Scott Emsley and Robin S. Emsley for an order for the sale of dwelling pursuant to the provisions of Code of Civil Procedure Section 704.750 in connection with the levy and execution upon defendant James E. Smith's real property by plaintiffs. A hearing was held on June 1, 1993 in Department M of the above entitled court before the Honorable Thomas Murphy, Superior Court judge. The court's ruling was issued telephonically pursuant to Rules of the Superior Court, North County Judicial District. The court, having considered the moving papers submitted by the plaintiffs, the opposition of the defendant, the reply of the plaintiffs, the matters of which the court has been requested to

take judicial notice and the records and papers on file herein and after due deliberation, finds:

1. Lots 780, 781, 782, 785, S and T of the subject property as more fully described in Exhibit A hereto do not contain dwellings on them within the meaning of Section 704.710(a)(1) of the California Code of Civil Procedure.

2. Lots 783 and 784, as more fully described in Exhibit B hereto, do contain dwellings within the meaning of Section 704.710(a)(1) of the California Code of Civil Procedure.

3. That such dwellings on lots 783 and 784 are exempt within the meaning of Section 704.780 to the aggregate extent of $100,000 in accordance with the provisions of Sections 704.730(a)(3) and 704.780(b) of the California Code of Civil Procedure.

3. The fair market value of Lots 783 and 784, as more fully described in Exhibit B hereto, is as follows:

3.1 Lot 783	$300,000.00
3.2 Lot 784	$550,000.00

It is, therefore, ORDERED,

1. That the motion of plaintiffs is GRANTED.

2. No order for sale of Lots 780, 781, 782, 785, S and T, as more fully described in Exhibit A hereto, is required by the plaintiffs to effect execution upon those lots as they do not contain a dwelling within the meaning of

Section 704.710(a)(1) of the California Code of Civil Procedure. These lots are properly sold pursuant to the provisions of Section 701.510 of the California Code of Civil Procedure.

3. That Lots 783 and 784, as more fully described in Exhibit B hereto containing dwellings within the meaning of Section 704.710(a)(1) of the California Code of Civil Procedure are properly ordered sold by the Marshal.

4. That Lots 783 and 784, as more fully described in Exhibit B hereto, are subject to a homestead as defined in Section 704.710(c) of the California Code of Civil Procedure.

5. That Lots 783 and 784, as more fully described in Exhibit B hereto, are to be sold by the marshall subject to the provisions of Section 704.720 of the California Code of Civil Procedure.

6. That the aggregate amount of the homestead exemption applicable to the sale of all of the defendant's property upon which a dwelling subject to a homestead is situated is $100,000 in accordance with the provisions of Section 704.730(a)(3) of the California Code of Civil Procedure.

7. That the minimum bid for lots 783 and 784, but not both, in accordance with the provisions of Section 704.800(a) of the California Code of Civil Procedure shall be:

7.1 $100,000

7.2 plus the amount necessary to satisfy all liens and encumbrances on the property in accordance with the provisions of Section 704.800(a).

Dated: JUN 29 1993

THOMAS R. MURPHY
Judge of the Superior Court

EXHIBIT A

Lot 780, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 780 is part of Assessor's Parcel No. 299-200-55-00).

Lot 781, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 781 is part of Assessor's Parcel No. 299-200-55-00).

Lot 782, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 782 is part of Assessor's Parcel No. 299-200-55-00).

Lot 785, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 785 is part of Assessor's Parcel No. 299-200-55-00).

Lot "S", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder of San Diego County. (Lot "S" is part of Assessor's Parcel No. 299-261-44-00).

Lot "T", in Block 37 of ARDEN HEIGHTS UNIT No. 4, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of the County Recorder of San Diego County. (Lot "T" is part of Assessor's Parcel No. 299-19-23).

EXHIBIT B

Lot 783, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 783 is part of Assessor's Parcel No. 299-200-55-00).

Lot 784, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 783 is part of Assessor's Parcel No. 299-200-55-00).

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, vs. JAMES E. SMITH, et al., Defendants. AND RELATED CROSS-ACTION	CASE NO. N 49451 ORDER APPLYING DEFENDANT'S NON-VESTED PROPERTY INTEREST TO SATISFACTION OF JUDGMENT [TELEPHONIC] (Filed June 29, 1993) DATE: JUNE 1, 1993 TIME: 2:00 P.M. CTRM: DEPT. M JUDGE: MURPHY

This matter came before the court for decision on the motion of plaintiffs, Margaret L. Roulette, S. Scott Emsley and Robin Emsley for an order applying the non-vested

property interest of defendant, James E. Smith, in satisfaction of money judgment. A hearing was held on June 1, 1993 in Department M of the above-entitled court before the Honorable Thomas Murphy, Superior Court Judge. The court having read and considered the moving papers of plaintiff, the opposition of defendant and the reply of plaintiff, having taken judicial notice of the matters requested by the parties including the records and papers on file in this action, and after due deliberation, finds that plaintiffs recovered a judgment against defendant which effected a rescission of the deeds from defendant to plaintiffs and a cancellation of the deeds of trust from the plaintiffs to defendant it is, therefore,

ORDERED, that the motion of plaintiffs to apply the non-vested property interest of defendant, James E. Smith, in partial satisfaction of the judgment upon sale by the Marshal is GRANTED.

IT IS FURTHER ORDERED, that plaintiffs may levy and sell the real property described on Exhibit A hereto in satisfaction of their judgment against the defendant in such order as plaintiffs shall determine.

IT IS FURTHER ORDERED, that upon sale of the property by the Marshall, it shall be sold free and clear of any interest, lien or encumbrance of defendant or plaintiff in the property described in Exhibit A hereto in accordance with the provisions of the judgment entered in favor of plaintiffs against the defendant on August 19, 1992 and amended on February 23, 1993.

IT IS FURTHER ORDERED, that in the event that the judgment in favor of plaintiffs against the defendant shall have been fully-satisfied by the levy and sale of other

property of the defendant prior to the levy and sale of the property described on Exhibit A, then, in such event, plaintiffs shall reconvey to the defendant the property, or part thereof, by quitclaim deed.

Dated: JUN 29 1993

THOMAS R. MURPHY
Judge of the Superior Court

EXHIBIT A

Lot "H", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder of San Diego County. (Lot "H" is part of Assessor's Parcel no. 299-261-26-00).

Lot "I", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder of San Diego County. (Lot "H" is part of Assessor's Parcel No. 299-261-27-00).

Lot "J", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder

of San Diego County. (Lot "H" is part of Assessor's Parcel No. 299-261-27-00).

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, vs. JAMES E. SMITH, et al., Defendants. AND RELATED CROSS-ACTION	CASE NO. N 49451 ORDER DENYING DEFENDANT'S MOTION TO DETERMINE WHAT VACATED STREETS AND ALLEYS WOULD BE SOLD WITH WHAT LOTS **[TELEPHONIC]** (Filed June 29, 1993) DATE: JUNE 1, 1993 TIME: 2:00 P.M. CTRM: DEPT. M JUDGE: MURPHY

This matter came before the court for decision on the motion of defendant, James E. Smith, requesting the court to determine what portions of the adjacent vacated streets or alleys will be sold with what lots in connection with the levy and execution upon defendant's property by plaintiffs. A hearing was held on June 1, 1993, in Department M of the above entitled court before the Honorable Thomas Murphy, Superior Court Judge. The court having

considered the moving papers submitted by the defendant, the opposition of the plaintiffs, the records on file herein and after due deliberation finds that the moving party has failed to submit a Memorandum of Points and Authorities in compliance with the provisions of Rule 313(a) of the California Rules of Court, it is, therefore,

ORDERED, that the motion of the defendant, James E. Smith is DENIED.

IT IS FURTHER ORDERED, that the court elects to treat the absence of a Memorandum of Points and Authorities as an admission by the defendant that the defendant's motion is not meritorious pursuant to the provisions of Rule 313(a) of the California Rules of Court.

Dated: JUNE 29 1993

THOMAS R. MURPHY
JUDGE OF THE
SUPERIOR COURT

APPENDIX Y

Plaintiff's Exhibit 16

Order Number 767125-11

Escrow Number 1-21367

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL THIS DEED AND UNLESS OTHERWISE SHOWN BELOW, MAIL TAX STATEMENTS TO:

James E. Smith
2204 Ocean Front
Del Mar, CA 92014

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Parcel No. (11001) 877-003-17; 299-261-12; 299-261-13; 299-200-06;-07;08; 299-192-09;10;11; and 12.

Del Mar
(City)

TRANSFER TAX PAID
HARLEY F. BLOOM
RECORDER

CORPORATION GRANT DEED

THE UNDERSIGNED GRANTOR DECLARES

DOCUMENTARY TRANSFER TAX IS $885.50

X computed on full value of property conveyed, or

_ computed on full value less value of liens or encumbrances remaining at time of sale, and

HOME BUSINESS DEVELOPMENT CORPORATION

a corporation organized under the laws of the state of California For a valuable Consideration, the receipt of which is hereby acknowledged, hereby GRANTS To James E. Smith, an unmarried man all that real property situated in the County of San Diego, State of California, described as follows:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots are closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with that portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

In Witness Whereof, said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its ___ President and ___ Secretary thereunto duly authorized.

Dated: December 6, 1977

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On December 8, 1977 before me, the undersigned, a Notary Public in and for said State, personally appeared John W. Guth, known to me to be the ___ President, and C.O. McEfee known to me to be Vice President of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the within instrument pursuant to its by-laws or a resolution of the board of directors. WITNESS my hand and official seal.

Signature Leticia M. Belanger
Leticia M. Belanger
Home Business Development Corporation

By _____
John W. Guth President

By _____
C. O. McEfee Secretary

[SEAL]
OFFICIAL SEAL
LETICIA M. BELANGER
NOTARY PUBLIC - CALIFORNIA
Principal Office, San Diego Co., Calif.
My Commission Exp. Dec. 11, 1990

(This area for official notarial seal)
MAIL TAX STATEMENTS TO PARTY SHOWN ON FOLLOWING LINE: IF NO PARTY SHOWN, MAIL AS DIRECTED ABOVE

SEP 1 1993
OFFICE OF THE CLERK

No. 93-163

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

vs.

THE CITY OF DEL MAR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One State of California

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Respondent City of Del Mar ("Del Mar") objects to Question No. 1 presented to this Court for review, on the ground that it improperly goes beyond the scope of review. Question No. 1 seeks to challenge for the first time in this Court the merger statute itself, enacted by the Legislature, and not the enforcement of Respondent Del Mar's ordinance.

Although Question No. 2 presented for review asks this Court to find, contrary to the California Court of Appeal, that Del Mar's zoning of his property amounted to "spot zoning," Petitioner James E. Smith ("Smith") offers no supporting argument for this question. Del Mar therefore respectfully requests that this Court refrain from making any findings concerning this question.

Question No. 3 presented for review concerns the propriety of the vote for dissolution of the Del Mar Civic Association after its reconveyance of property to its members according to their individual property shares. Smith challenges the Association's award of one vote for Smith's one approximately twenty-acre lot. Similar to Question No. 1, this issue against Del Mar Civic Association was raised for the first time in this Court. Del Mar Civic Association is not a party herein. As in Question No. 2, no supporting argument is offered by Smith. Del Mar therefore asks this Court to disregard this question.

Despite the questions presented, in his brief Smith appears to have limited the questions for review to a single issue; he asks this Court's reversal of the California Court of Appeal's holding that Del Mar's merger of the twenty lots was not a "taking" requiring compensation under the Fifth Amendment.

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No. 93-163

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

vs.

THE CITY OF DEL MAR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One State of California

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In December of 1977, Petitioner James E. Smith (hereafter "Smith") purchased approximately twenty acres of real property located in the City of Del Mar (hereafter "Del Mar"). The twenty acres consisted of one developed legal parcel. Prior to Smith's purchase, the subject property had consisted of twenty lots, which had been merged in April of 1977 pursuant to then California Government Code § 66424.2. The lots were merged because the subject property contained contiguous, commonly-owned, undeveloped, substandard-sized lots, consistent with the Section's

provisions. Smith was aware of the property's single-parcel merged status at the time of purchase. After purchase, Smith claimed Del Mar's merger was invalid and that he was entitled to compensation for a "temporary taking" of the subject property during the period the allegedly invalid merger was in effect. The merger was released in 1985 by Del Mar pursuant to Smith's request, but Smith did not file his complaint until September of 1987. (Petitioner Smith's Appendix ("App.") N-1). Nor did Smith ever file with Del Mar any meaningful applications for development of the property during the entire time he has owned the property.

After some 35 days of trial, the trial court determined that no taking of Smith's property had occurred.

An appeal by Smith followed. Based on its careful interpretation of legislation concerning mergers of real property and its application of the law concerning regulatory takings of property to the facts found by the trial court (App. E-7-26), the Court of Appeal concluded that not only had Smith's property been validly merged, but that Respondent Del Mar had not taken Smith's property without just compensation, either through the merger or through zoning regulations. The Court of Appeal also upheld the trial court's determination that Del Mar was not liable to Smith for any alleged failure to advise the Del Mar Civic Association that he had twenty votes, rather than the one vote the Association decided he had. (App. E-26-27). The Court of Appeal rejected Smith's claim that if he had been accorded twenty votes instead of one, a different outcome would have resulted in the Association's vote conveying to Del Mar certain beach land in which Smith claimed an interest.

REASONS FOR DENYING THE WRIT

I.

A PETITION FOR SUPREME COURT REVIEW SHOULD BE DENIED WHERE THERE IS NO CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Rule 10 of the Rules of the Supreme Court provides in Section 10.1 that one of the reasons for granting a writ of certiorari is that "a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court."

Smith relies on that consideration in bringing his petition for review, claiming a conflict with *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S. Ct. 2886 (1992). As is set forth below, there is no conflict with the holding in *Lucas* nor any other decision of this Court.

A. *Lucas* Is Not Dispositive.

Del Mar respectfully submits that this Court's recent decision in *Lucas* does not mandate reversal, as Smith claims. Smith urges that the Court of Appeal incorrectly read and applied *Lucas* and its predecessor cases concerning the circumstances under which regulations become confiscatory and require compensation. The Court of Appeal reviewed substantial evidence, including more than twenty volumes of Reporter's Transcripts, six volumes of Clerk's Transcripts and "numerous" exhibits. (App. E-26, n. 7). The court then determined that there had been no taking under the "regulatory taking" line of cases, because Smith had not been deprived of all economically beneficial use of his property — the one merged lot he had originally purchased, which he was not prevented from re-subdividing, and which he had marketed and lived on as a single parcel — and because Smith failed to show that a legitimate state interest had not been substantially advanced.

(App. E-19-20 and E-26). This finding was consistent with both the letter and the spirit of *Lucas, supra.*

In *Lucas*, as was shown in footnote 9 on page 2896, this Court based its decision upon "the same factual assumptions as did the Supreme Court of South Carolina", that is, that Lucas' property had been "rendered valueless by respondent's enforcement of the coastal-zone construction ban." *Id.* at 2896. No such factual assumptions were made by the trial court herein; to the contrary, it found that at all times there *was* economically viable use of Smith's property.

Despite the completely different factual backgrounds of *Lucas* and the case at bench, the Court of Appeal considered the direction provided by *Lucas* (App. at E-15-16 and E-19-20) in reaching the conclusion that "the merger did not result in a taking which deprived SMITH of 'all economically beneficial or productive use of land' . . . ." (App. at E-19). The appellate court relied on the trial court's findings of fact to reject Smith's argument that he had been deprived of "all economically beneficial or productive use of land." The trial court's findings essentially established or permitted reasonable inferences that Smith acquired the property as a whole, marketed the property as a whole at all times during the time the merger was on the property, enjoyed the property as his own residence and was not limited through the merger to using his property as a single building site because he could have sought a new subdivision. (App. at K-8-10). Further,

> there was *no* finding the City was at all times intending to acquire the SMITH property for park purposes, was intentionally thwarting SMITH's efforts to develop his property or that the City was engaging in any unreasonable delay in initiating condemnation. (Emphasis added.)

(App. at E-19).

The Court of Appeal thus found that this was not a *Lucas* situation where restrictive regulations had been enacted after the property owner acquired the property, and a construction ban had been enforced which would have deprived Lucas of "*all* economically beneficial uses . . . ." (Emphasis in original.) *Id.* at 2895. The *Lucas* decision in particular noted the need to inquire into whether the "proscribed use interests" were a "part of [the property owner's] title to begin with." 112 S. Ct. at 2899. No twenty-lot subdivision rights were a part of Smith's rights "to begin with", as he bought only a single parcel. The Court of Appeal's decision is consistent with this Court's holding in *Lucas, supra. Lucas* does not mandate reversal.

B. The Trial Court Did Not Conduct A Balancing Test; It Found Del Mar's Actions Substantially Advanced Legitimate Governmental Interests, Contributing To Its Finding That No Taking Occurred.

Smith paradoxically claims first that "the court(s) below failed to properly weigh private and public interests" (Petitioner's Petition for Writ of Certiorari ("Pet."), at 10) and then that no such "balancing" test is applicable to a "takings" claim (Pet. at 11). This Court has on numerous occasions stated that in order to demonstrate a "taking," the landowner must show either that the non-possessory regulation was enacted for an illegitimate purpose or that the legitimate purpose for which it was enacted is not being achieved. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), the Supreme Court observed that:

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" . . . They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.

Id. at 834-835. Among those legitimate state interests, according to the holding in *Nollan*, are scenic zoning, residential zoning and landmark preservation:

> *Agins v. Tiburon* [447 U.S. 255 (1980)] at 260-262 . . . (scenic zoning); *Penn Central Transportation Co. v. New York City* [438 U.S. 104 (1978) . . . (landmark preservation); *Euclid v. Ambler Realty Co.* 272 U.S. 365 . . . (1926) (residential zoning) . . . .

Nollan, supra, at 835.

The above rules were unaffected by *First English Evangelical Lutheran Church v. Los Angeles ("First Lutheran I")*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). The *First Lutheran I* decision stated that money damages were a constitutionally required remedy if there had been a temporary taking of all use of the property. *Id.* at 2385-2389. Upon remand, the Court of Appeal held that the actual interim ordinance was reasonable in purpose, duration and scope and thus did not constitute a temporary taking. *First English Evangelical Lutheran Church v. County of Los Angeles ("First Lutheran II")*, 210 Cal. App. 3d 1353, *cert. denied*, 493 U.S. 1056 (1989).

Here, the trial court specifically found a legitimate purpose behind the merger doctrine:

> The court finds that one of the compelling reasons for mergers to occur was to consolidate yet undeveloped lands existing under ancient and outdated subdivisions which took no account of the relevant considerations in modern subdivision analysis (slope, grade, soils analysis, density, ecology, and

> environmental concerns, drainage, aesthetics, access, and easements are only some of such concerns). (App. K-9).

Thus, a legitimate governmental purpose was furthered by the recordation of the Notice of Merger; no "taking" therefore occurred.

C. Smith Had No "Bundle" Of Rights To Be Destroyed; His Expectation Could Only Have Reasonably Been As To A Single Piece Of Property.

Smith urges that he was entitled to an expectation of twenty lots, not the single parcel he purchased with full knowledge of the merger. The Court of Appeal rejected that argument, noting that Smith was claiming some fundamental "vested right" to the original subdivision of twenty lots, which was not applicable under these circumstances. (App. E-25). The appellate court cited Smith's purchase of the already-merged property and his failure to perform substantial work or incur substantial liability in reliance on the original subdivision as indicia of the non-applicability of the "vested right" doctrine. (App. E-25). Smith therefore had no "bundle of rights" to be destroyed.

Lucas, supra, also supports the conclusion that no "bundle of rights" was destroyed by the merger. This Court noted that the expectations to which the property owner is entitled (his "bundle of rights") upon acquisition of the property are necessarily limited by both the scope of the title upon acquisition and reasonable expectations the property owner must have with respect to additional exercise by the State of its police power. *Id.* at 2800-2900. As Smith's expectations were limited by the fact that his title only encompassed one parcel, his "bundle of rights" did not include the right to twenty lots.

It is immaterial whether the merger statute was "new" to

California; the novelty of the statute is not "critical" to a "taking" analysis. Smith purchased the property with notice that it was one lot, not twenty, and made no "meaningful" application to subdivide it.

D. The Merger Did Not Destroy The Existence Of Twenty Lots; Del Mar Merely Enforced A Valid Merger Of Property Which Included Substandard Lots.

Smith argues that twenty lots were "taken" due to the merger. However, both the trial court and the Court of Appeal properly considered the property as a whole. Smith has failed throughout to demonstrate any legal basis upon which he believed he had a right to twenty parcels, other than that he owned twenty acres of land. As stated by the Supreme Court in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, *rehg. denied,* 439 U.S. 883 (1978):

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with rights in the parcel as whole . . . .

Id. at 130-131. Based on the above, the "property" to be considered in determining whether the merger constituted a condemnation is the single legal parcel purchased, developed and used as a single-family estate. Del Mar merely enforced a valid merger of property which included substandard lots.

E. There Was No Destruction Of *All* Economically Viable Use; Smith Cannot View His Property As Twenty Unusable Lots, But Rather As One Lot With Economically Viable Use.

Smith's last point is that through merger he lost all economically viable use of twenty lots, which were "destroyed" and rendered "nonexistent", entitling him to compensation. His position is without merit, because not only does he have only one lot, as purchased, but even that one lot has economically viable uses without being subdivided.

Smith objects that the economically viable uses recognized by both the trial and appellate courts herein were rejected by the court in *First Lutheran I, supra.* That objection is incorrect. On remand in *First Lutheran II,* at 1367-1371, the appellate court confirmed that "all" means "all", that is, if the subject property, a 21-acre private campground called Lutherglen, could still be used for the camping facilities permitted at the time of purchase, then an ordinance prohibiting construction of structures on campground land would not constitute a regulatory taking.

The trial court herein was guided by the above decisions in finding that Smith had not been deprived of all economically viable use. (App. K-8-12). Smith cites no valid authority for his claim that economically viable use is dependent on his having twenty lots instead of one. No taking occurred because Smith had economically viable use of his property at all times.

CONCLUSION

For the foregoing reasons, Del Mar respectfully requests that Smith's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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& GRINDLE
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APPENDIX

Note: The sole item appended herein is a copy of 62 Ops. Cal. Atty. Gen. 281 (1979), which is referred to by both Petitioner James E. Smith in his Petition for Writ of Certiorari and by the California Court of Appeal, Fourth Appellate District, Division One, in its unpublished opinion (Appendix to Petitioner James E. Smith's Petition for Writ of Certiorari, at E-13-14). While Respondent City of Del Mar does not refer to said Opinion in its Brief in Opposition, it is appended for the convenience of this Court in its determination of whether to grant the writ of certiorari.

APPENDIX A — ATTORNEY GENERAL'S OPINION

Opinion No. CV 78-135 — May 25, 1979

SUBJECT: MERGER AND UNMERGER OF PARCELS — Parcels that were merged under the provisions of Government Code section 66424.2 as originally enacted may be deemed unmerged by local ordinance pursuant to the 1977 amendment of the statute.

Requested by: SENATOR, 38TH DISTRICT

Opinion by: GEORGE DEUKMEJIAN, Attorney General
Rodney Lilyquist, Jr., Deputy

The Honorable William A. Craven, Senator for the 38th District, has requested an opinion on the following questions:

1. Did parcels that were eligible for development on January 1, 1977, under the provisions of an existing local ordinance meet the condition of merger in Government Code section 66424.2 as originally enacted?

2. Do parcels that are eligible for development under the provisions of an existing local ordinance meet the conditions of merger in Government Code section 66424.2 as amended?

3. What kinds of parcels, if any, were unmerged by the 1977 amendment of Government Code section 66424.2?

4. May parcels merged by the original enactment of Government Code section 66424.2 be deemed unmerged by local ordinance pursuant to the 1977 amendment of the statute?

Appendix A

The conclusions are:

1. Parcels that were eligible for development on January 1, 1977, under the provisions of an existing local ordinance did not meet the conditions of merger in Government Code section 66424.2 as originally enacted.

2. Parcels that are eligible for development under the provisons of an existing local ordinance do not meet the conditions of merger in Government Code section 66424.2 as amended.

3. No parcels were expressly unmerged by the provisions of the 1977 amendment of Government Code section 66424.2.

4. Parcels that were merged under the provisions of Government Code section 66424.2 as originally enacted may be deemed unmerged by local ordinance pursuant to the 1977 amendment of the statute.

ANALYSIS

The four questions presented for analysis concern the proper interpretation of Government Code section 66424.2.[1] The statute was enacted effective January 1, 1977, and was amended by the Legislature effective July 7, 1977. It covers the conditions under which contiguous parcels of land held by the same owner are merged or are deemed unmerged for purposes of the Subdivision Map Act. (§§ 66410-66499.37 (hereinafter "Act").)

In general terms, the Act provides for a rational and orderly means by which land can be divided, developed, and improved. It

1. All unidentified section references hereinafter refer to the Government Code.

accomplishes this purpose by requiring, with few exceptions, that any division of land be shown on a map approved by the local governing agency. If the division and proposed development will create the need for access, drainage, utilities, and other services, the local agency may condition the approval of the division upon such improvements being made by the subdivider. (See *Bright v. Board of Supervisors* (1977) 66 Cal. App. 3d 191, 193-194; 61 Ops. Cal. Atty. Gen. 299, 300 (1978); 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, §§ 22-24, pp. 1788-1792; 2 Odgen's Revised Cal. Real Property Law (1975) §§ 25.1-25.2, pp. 1204-1206.)

Procedurally, if the land division results in four or fewer parcels, a "parcel" map is normally required; a "final" map involving stricter requirements is generally necessary for a division resulting in five or more parcels. (§§ 66426, 66428; *Bright v. Board of Supervisors, supra*, 66 Cal. App. 3d 191, 195; 4 Miller & Starr, Current Law of Cal. Real Estate (1977) §§ 24:33-24:35, pp. 60-68; 9 Hagman & Volpert, Cal. Real Estate Law Practice (1978) § 290.03, pp. 290:6.2-290:8.)

Within this statutory scheme, the issue of whether certain parcels "merge" under the provisions of section 66424.2 can become significant. For example, a landowner may acquire a parcel next to his and subsequently desire to sell it. If the two parcels have merged for purposes of the Act because of their common ownership, the owner may be required to obtain approval of a parcel map[2] before being allowed to convey the second parcel.

The first question concerns the conditions that were necessary

---

2. Section 66428 allows a local agency to waive the requirement for a parcel map under certain conditions.

for the statutory merging of parcels between January 1, 1977, and July 7, 1977, the period during which section 66424.2 was in effect as originally enacted. Specifically, the issue is whether parcels merged that did not meet the numerical specifications established by local ordinance for a minimum parcel size but did meet an alternative standard unrelated to the parcels' physical dimensions. An example would be a city ordinance for a particular zone of the city that (1) established a 5000 square feet minimum parcel area, but (2) allowed development of a residential dwelling on a parcel regardless of size if the parcel had a separate parcel number on a recorded subdivision map. Under such a city ordinance, the owner of a "substandard" parcel of 4000 square feet could build a residential dwelling if the parcel had a separate subdivision map number. We conclude that if parcels were eligible for development by local ordinance during the period section 66424.2 was in effect as originally enacted, the parcels were not subject to the statute's merger provisions.

As enacted effective January 1, 1977, section 66424.2 provided in pertinent part:

> ". . . two or more contiguous parcels or units of land which have been subdivided under the provisions of this division or any prior law regulating the division of land or a local ordinance enacted pursuant thereto shall not merge by virtue of the fact that such contiguous parcels or units are held by the same owner and no further proceeding under the provisions of this division or a local ordinance enacted pursuant thereto shall be required for the purpose of sale, lease or financing of such contiguous parcels or units, or any of them;

except that, *if any one of such contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size to permit use or development under a zoning, subdivision or other ordinance of the local agency and at least one of such contiguous parcels or units is not developed with a building for which a permit has been issued by the local agency, then such parcels shall be merged for the purpose of this division* (unless a local ordinance specifically exempts such parcels from merger in such circumstances). . . ." (Emphasis added.)

In construing section 66424.2, we are guided by several principles of statutory construction. The cardinal rule is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Select Base Materials v. Board of Equal,* (1959) 51 Cal. 2d 640, 645; accord, *Cossack v. City of Los Angeles* (1974) 11 Cal. 3d 726, 732.) Legislative intent is determined first by turning to the words used in the statute, giving them effect according to their usual and ordinary meaning. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230; *Steilberg v. Lackner* (1977) 69 Cal. App. 3d 780, 785.) While words should not be added to a statute where its meaning is unambiguous (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal. 3d 152, 155), absurd results should be avoided if possible. (*Nightingale v. State Personnel Board* (1972) 7 Cal. 3d 507, 513; *Rosenthal v. Hansen* (1973) 34 Cal. App. 2d 754, 756.) An exception contained in a statute is to be strictly construed in favor of the general rule. (*City of National City v. Fritz* (1949) 33 Cal. 2d 635, 636; *Marrujo v. Hunt* (1977) 71 Cal. App. 3d 972, 977.)

Appendix A

In enacting section 66424.2, the Legislature's apparent general purpose was to make clear that parcels did not merge for purposes of the Act if they had been created in compliance with existing subdivision laws and regulations. In effect, the statute reversed an erroneous conclusion reached in 56 Ops. Cal. Atty. Gen. 509, 512-513 (1973), and codified the conclusion reached in 59 Ops. Cal. Atty. Gen. 239, 241 (1976), where we stated:

> ". . . a construction that any two contiguous parcels properly created under the Map Act are merged into one parcel wherever held under one ownership does not generally further the purposes of the Map Act where the local agency had previously considered and approved the division. Thus, the sale or lease or financing of any parcel or parcels for a subdivision created in compliance with the Map Act is lawful without the necessity of filing a new parcel map because no new division is created. Based on these considerations, the conclusion follows that the Subdivision Map Act does not require a parcel map for the construction of a building toward sale, lease, or financing of a parcel for which a map thereof has already been recorded in accordance with law. Cf. 56 Ops. Cal. Atty. Gen. 496 (1973). A parcel once recorded under the Subdivision Map Act need not be re-recorded so long as it is not further divided."

The legislation, however, also provided for an exception to the general nonmerger rule. It established the following limited conditions for the merger of parcels created in compliance with

existing subdivision laws and regulations: (1) the parcels must be contiguous, (2) they must be held by the same owner, (3) one of the parcels must not conform to locally established standards for minimum parcel size to permit use of development, (4) one of the parcels must not be developed with a building for which a building permit was issued, and (5) local ordinances must not exempt the parcels from merger.

The critical words of the statute for purposes of analyzing the first question are: "does not conform to standards for minimum parcel size to permit use or development under a zoning, subdivision or other ordinance of the local agency." In the example given, the minimum parcel size standard in terms of numerical specifications was established by the city at 5000 square feet. Use or development, however, was permitted under certain conditions without regard to this minimum measurement standard.

It may be argued that "exceptions" to established measurement standards for minimum parcel size do not create new "standards" for determining minimum size. On the other hand, it can be argued that the "standards" under section 66424.2 need not refer only to specific numerical measurements.

We believe that this is an extremely close question. A "standard" is commonly defined as a rule used to determine a quantity or quality for a specific purpose. (See Webster's New Internat. Dict. (3d ed. 1966) p. 2223.) Generally, no requirement is made that the standard establish a specific numerical criterion. We can find no expression of legislative intent to support a restrictive interpretation of the word "standards" in section 66424.2.

. Moreover, it would appear anomalous for the Legislature to act contrary to the general purpose of the statute when parcels are

initially created with the approval of the local agency *and* may otherwise be used and developed under existing local regulations. We do not believe that the Legislature would purposely take control from the local agency in such circumstances without expressly so providing.

In addition, as previously noted, we must strictly construe the merger exception language of section 66424.2 in favor of the general nonmerger rule. Consequently, a liberal interpretation of the phrase "standards for minimum parcel size" is appropriate.

Accordingly, a city ordinance may provide that a parcel is of minimum parcel size to permit use or development if it (a) contains a total area of 5000 square feet or (b) has a separate number on a recorded subdivision map. The latter alternative is a standard "for minimum parcel size" although not specified in terms of the physical dimensions of the parcel. Given that a parcel with a subdivision map number must necessarily have some "size," the alternative standard establishes a size criterion that is flexible in terms of actual dimensions but specific in terms of the test to be applied.

Consequently, we believe that between January 1, 1977, and July 7, 1977, a local ordinance could have established "standards for minimum parcel size to permit use or development" under section 66424.2 by referring to factors other than numerical measurements. Allowing use or development of any parcel that has been duly subdivided and recorded would have been such a "standard" for minimum parcel size.

The conclusion to the first question, therefore, is that parcels did not meet the conditions for merger under section 66424.2 as enacted effective January 1, 1977, if they were then eligible for use or development pursuant to an existing local ordinance.

Appendix A

The second question restates the first question except that it refers solely to the 1977 amendment of section 66424.2. Hence, we must determine whether the statute was changed concerning the conditions specified for merger, particularly with regard to the issue of possible use or development of "substandard" parcels. We conclude that no changes were made that would require a different conclusion.

The amendment continued the general provisions as to when parcels were not merged for purposes of the Act. The major change in the statute was to shift complete control over the merger of substandard parcels to the local agencies. Although the statute specified the conditions under which merger *could* occur, it no longer merged the parcels under its own terms; rather, it authorized local agencies to merge by ordinance those parcels meeting the given requirements.

Although minor changes were made in the conditions under which merger could occur, the requirement that one of the parcels "not conform to standards for minimum parcel size to permit use or development under a zoning, subdivision or other ordinance of the local agency" remained the same. Our analysis of the first question is thus applicable to the second question.

The conclusion to the second question, therefore, is that parcels do not meet the conditions of merger in section 66424.2 as amended effective July 7, 1977, if they are eligible for use or development under an existing local ordinance.

The third question concerns the types of parcels, if any, that were unmerged by the 1977 amendment of section 66424.2. We conclude that no parcels were unmerged by the amendment.

Appendix A

As previously mentioned, the 1977 amendment continued the general language of the enactment concerning when parcels did not merge for purposes of the Act. It also provided additional circumstances under which merger would not occur for purposes of the Act. We do not view these general provisions as a change in the statutory scheme so as to cause the unmerging of previously merged parcels. Instead, the plain language of the statutory amendment indicates only a legislative intent to clarify existing law and to shift complete control over the merger of substandard parcels to the local agencies.

The conclusion to the third question, therefore, is that the 1977 amendment of section 66424.2 did not specifically unmerge any particular parcels of property.

The fourth question concerns whether, under the 1977 amendment of section 66424.2, local agencies may unmerge parcels that were merged by the Legislature in enacting the statute in its original form. We conclude that they may.

The statute now provides by amendment: "A local agency may, by ordinance, deem any or all parcels or units of land which merged prior to the effective date of the 1977 amendments to this section, unmerged and separate parcels." We believe this language to be unambiguous as to legislative intent. The Legislature recognized that it had merged certain parcels by the original enactment of section 66424.2 and determined that local agencies should be able to reverse the process after the effective date of the statutory amendment.

The conclusion to the fourth question, therefore, is that for purposes of the Act, any parcels that were merged by the original enactment of section 66424.2 may be deemed unmerged by

ordinance of a local agency pursuant to the 1977 amendment of the statute.

Supreme Court, U.S.
FILED
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No. 93-163

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

THE CITY OF DEL MAR,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Respondent's objection is refuted by the Second Amended Complaint dated November 14, 1988 at Pet. App. L-3-4; and the Lower Court Opinion at App. E-7-20.

2. Respondent's objection is refuted by Fn[3], p 3, Fn[4], p 4 and pp 17 and 18 of the Petition wherein, among other things, the "zoning map" at Pet. App. V-1 is referenced. The island "Spot Zoning" depicted at Pet. App. V-1 is so visually obvious that further expansive argument is unnecessary.

3. Respondent's objection is refuted by the Second Amended Complaint dated November 14, 1988 at Pet. App. L-7-10; and the Civic Association's reconveyance of property *was not* to its members as stated by Respondent here; but was conveyed to Del Mar as Respondent states at p 2 of Resp. Opp. Br. (last sentence).

The "root" of the entire Petition argument is (1) parcel versus (20) lots and "Spot Zoning."

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THE CITY OF DEL MAR,

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Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, James E. Smith, respectfully submits this Reply to Brief in Opposition.

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests this Court to take "Judicial Notice" of the Petition for Writ of Certiorari, Case No. 93-359, filed in this Court on September 2, 1993, involving the same parties and court below. This Petition (Case No. 93-359), and other pending litigation was brought to this

Court's attention at pp 5-7 of the Petition filed on August 2, 1993 for this Case No. 93-163.

In addition, a third Petition for Writ of Certiorari, involving the same property and court below, will be filed in late September, 1993 (Appendix now at the printers), concerning the California Supreme Court's denial on August 25, 1993 of the Petition for Review brought to this Court's attention at p 5, 2nd paragraph, under Statement of Other Litigation Pending in the Petition filed on August 2, 1993 for this Case No. 93-163.

Also, the Court of Appeal, Fourth Appellate District, Division One, Case No. D-15917, concerning Petitioner's new residence on lot T, Map No. 1343, on August 18, 1993 rendered its decision sustaining the trial court's decision. Petitioner plans a timely filing on or before September 27, 1993 of a Petition for Review in the California Supreme Court. On p 6, second paragraph, under Statement of Other Litigation Pending, Case No. 93-163 (i.e., this Petition), this pending litigation was brought to this Court's attention.

ARGUMENT

PETITIONER'S RIGHT TO COMPENSATION FOR A TAKING IS UNAFFECTED BY THE MERGED STATE OF THE LOTS AT THE TIME OF PURCHASE

Pursuant to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) the fact that Petitioner purchased the property in its merged state does not affect Petitioner's right to be compensated for a "Taking." Respondent overlooks this Court's holding in *Nollan* supra, that " . . . the

prior owners must be understood to have transferred their full property rights in conveying the lot(s)." *Id.* at 834, Fn[2].

Petitioner's predecessor had every right to possess and dispose of the lots in their subdivided state. In fact the lots were conveyed to Petitioner by deed which described the lots as they were originally subdivided (Pet. App. at Y-1-4).

Respondent similarly overlooks the fact that the merger statute was eventually repealed and the lots were deemed unmerged by operation of law (Pet. App. at R-5). Both factors lend credence to a contention that the statute was an invalid exercise of the state's police power in the first place. See Appendix A Resp. Opp. Br. p 8(a) and/or Pet. App. at B-9-10 wherein the California Attorney General states:

> "The conclusion to the first question, therefore is that parcels did not meet the conditions for merger under section 66424.2 as enacted effective January 1, 1977, if they were then eligible for use or development pursuant to an existing local ordinance." (Calif. 62 Ops. Cal.Atty.Gen. 281 (1979).

All twenty lots were eligible for use or development on January 1, 1977 by virtue of their creation "in compliance with existing subdivision laws and regulations." (62 Ops., supra at Pet. App. at B-10 and/or Appendix A. Resp. Opp. Br. p 6a).

Respondent contends that Petitioner made no "meaningful" application to subdivide the lots and suggests

that somehow this negates the impact of the fact that this statute was a novelty in California. (Resp. Opp. Br. p 8).

Petitioner submits that the City of Del Mar caused the lots to be merged in order to prevent their residential development. Suggesting that Petitioner merely had to re-subdivide the lots in order to develop them only strengthens this "taking" claim. The City, better than anyone, knows the bureaucratic nightmare a property owner must go through to have any development approved. Secondly, if the City is already anti-development then getting that approval is even less likely.

Professor Richard Babcock, the dean of the American land use bar, has called overreaching governmental regulation (in which the regulators demand that which they know they are legally precluded from demanding but which they know their targets cannot afford the time or expense to challenge) "municipal leverage." [Babcock, *Forward to Exactions: A Controversial New Source For Municipal Funds*, 50 Law and Contemp. Prob. 1, 2 (1987)]. Aside from this Court's celebrated response in *Nollan*, supra, in which this Court described such tactics as "extortion," [*Id.*, 837], some condemnatory judicial reactions can be found in *Collins v. City of Bloomington*, 246 N.W.2d 19 at 26 (Minn. 1976), ["grand theft"]; *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1 at 4-5 (N.J. 1966), ["municipal lawlessness"]; *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12 at 14 (N.H. 1981), ["extortion"].

Finally, Respondent has neglected to examine the "all use" criterion in light of *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992). Respondent

contends that Petitioner had not lost all economical viable use of the lots but neglects to shed any illumination upon what uses, in a constitutional sense, there were following the merger. Petitioner submits there were none following the destruction of the lot lines by the merger. However, under any analysis there were fewer uses left than in *Lucas*, supra, since the lots ceased to exist.

Any property owner who challenges this over-reaching police power is subjected to increased governmental interference of private property rights. The request for judicial notice of pending Case No. 93-359 is a perfect example of the erosion of private property rights and the effects of challenging a government out of control.

Case No. 93-359 filed on September 2, 1993 in this Court, involves the same parties and lots H, I and J, Map 1285 and lot U, Map 1343, [(4) of the (20) lots involved herein]. Respondent recorded "Notices of Violation of Illegal Subdivision" on said (4) lots by *"irrationally connecting"* the presumptions at California Civil Code §§ 831 and 1112 to "roadway vacation time" rather than "conveyance time." Case No. 93-359 further illustrates Respondent's use of illegal means to stop residences from being built on these (4) lots; and is in total contravention of Respondent's July 15, 1986 "legal lots" letter at Pet. App. P-1-2. Respondent illustrates that its written word is worthless and that Respondent is above the laws of California and the United States.

Respondent's main activity is enforcing and applying laws without due regard to the lot owner's rights which are tied up within his "bundle of rights." This case as

well as Case No. 93-359 serves to show how far Respondent Del Mar will go to ensure that lots not be developed if that be the wish of the City's operators. Hopefully, something will be done to stop it.

Respectfully submitted,
/s/ James E. Smith
JAMES E. SMITH
Propria Persona

Dated: September 9, 1993